

**ISLAMIC LAW AND SOCIAL CHANGE :**  
**A LEGAL PERSPECTIVE.**

**A thesis submitted to the Department of Religious  
Studies, University of Cape Town, in partial fulfilment  
of the requirements for the degree of Master of Arts.**

**Supervisor: Dr. Abdul Kader I. Tayob.**

**Submitted by: Mohammed Allie Moosagie.**

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## ABSTRACT.

**M**y thesis attempts, in the first instance to ascertain whether Islamic legal theory (*uṣūl*) has made provisions for the accommodation of changing social exigencies. If such provisions have been made, are they adequately employed to achieve optimum benefit?

In the second instance, the Islamic judicial process of discovering and formulating the Divine law and the elements that contribute towards it is subjected to scrutiny to ascertain whether it is proceeding according to the general provisions made for it in terms of the principles of the law or, whether this crucial process has since been abandoned, corrupted, distorted or replaced. I have chosen four representative classical works of *uṣūl al-fiqh* on which to base my assessment of *uṣūl* vis-à-vis changing social exigency. One of the works is a Shāfi'ī exposition; the second two are Hanafī expositions, and the fourth is a general exposition not located in a particular legal school (*madhhab*). After illustrating the inherent leeways to be found in the legal propositions together with the inherent scope accompanying the notions of *maṣlaḥah* (utility) and *ʿurf* (prevailing norms), I proceed to evaluate the extent to which these leeways are employed in the actual judicial process of two of the world's most authoritative judicial institutions namely; al-Azhar (Cairo) and Dārul ʿUlūm (Deoband). To do this, I analyze the *fatwa* (judicial decree) on organ transplantation from both these institutions. My analysis is not aimed at the outcome of the *fatwahs*, but rather at the processes involved in arriving at the particular verdicts.

In my conclusion I point to the ample provisions made by legal theory to contend with any social exigency and to the tragic neglect of their employment in the application of the law to novel situations. It is, therefore, the inconsistency between the provisions of legal theory and the absence of their application in the actual judicial process that has contributed to the current tension between law and social change.

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### NOTE ON transliteration.

**M**any Arabic words are simply not translatable into English because they may connote a different meaning from what is intended by the original Arabic. It is for this reason that Arabic words are transliterated into the Latin alphabet. However, the majority of transliterated words which carry no diacritical marks are prone to mispronunciation and misaccentuation. Faulty translation can only be remedied through a standard system of transliteration.

A full presentation of the Arabic alphabet and its transliteration symbols are present on the next page.

I have followed a standard system of non-phonetic transliteration with slight variations. Names which begin with the article "al" have been used uniformly without distinction between the so-called "*shamshi*" and "*qamari*" categories, such as, al-Rāzī instead of ar Rāzī. The *tā' marbūtah* is indicated by the 'h', as for example, *maṣlahah* instead of *maṣlahā* or *maṣlahat*. The Arabic titles and the authors of English works are not transliterated. Names of places that have been anglicized, such as, Damascus (Dimashq), have not been transliterated.



# The Arabic Alphabet.

## الْحُرُوفُ الْهَجَائِيَّةُ الْعَرَبِيَّةُ

Name		Phonetic Symbol	Name		Phonetic Symbol
ḍād	ض	ḍ	alif	ا	a
ṭā'	ط	ṭ	bā	ب	b
ẓā'	ظ	ẓ	tā	ت	t
'ayn	ع	'a	thā'	ث	th
ghayn	غ	gh	jīm	ج	j
fā'	ف	f	ḥā'	ح	ḥ
qāf	ق	q	khā'	خ	kh
kāf	ك	k	dal	د	d
lām	ل	l	dhal	ذ	dh
mīm	م	m	rā'	ر	r
nūn	ن	n	zā	ز	z
waw	و	w	sīn	س	s
hā'	ه	h	shīn	ش	sh
yā'	ي	y	ṣād	ص	ṣ

# Introduction.

---

One is often confronted with the question as to how Islamic law faces the undeniable challenge of the perpetual process of change without having to sacrifice any of its authenticity at the alter of change. How is it feasible that a single body of law continues to maintain its position as a means of sound ordering in a highly sophisticated world of computer technology, a world of rapid movement, and exploding urban populations, in the same manner it formerly did in the widely different conditions of ancient agricultural, pastoral, desert dwelling rural societies? What is the secret and magical formula that allows a body of legal principles and its implications to maintain such an effective and efficient ordering both in primitive rural and in modern urban civilizations? Is this magical power located in the "immutable" and rigid character of Islamic law and its ability to resist all calls for change, or is it in the genius of its flexible nature?

This thesis attempts, in the first instance to ascertain whether Islamic legal theory (*uṣūl*)<sup>1</sup> has made provisions for the accommodation of changing social exigencies. If such provisions have been made, are they adequately employed to achieve optimum benefit?

In the second instance, the judicial process of discovering and formulating the Divine law and the elements that contribute towards it is subjected to scrutiny to ascertain whether it is proceeding according to the general provisions made for it in terms of the principles of the law, or, whether this crucial process has since been abandoned, corrupted, distorted or replaced.

I have used the terms "legal theory" and "legal tradition" to mean *uṣūl al-fiqh*. *Uṣūl al-fiqh* is the formal science in which Muslim jurists have dealt with legal theories, principles of interpretations of legal texts, methods of reasoning and deduction of rules and other such matters. I have chosen four classical works of *uṣūl al-fiqh* on which to base my assessment of *uṣūl* vis-à-vis changing social exigency.

1. Al-Ghazzālī, *al-Mustaṣfā fī ʿIlm al-Uṣūl* (Beirut, 1983) 2 Vols.
2. Ibn Nujaym, *al-Ashbāh wa Al-Nazāʾir* (Beirut, 1980).
3. ʿAbd al-ʿAzīz bin Aḥmad al-Bukhārī, *Kashf al-Asrār* (Beirut, 1974) 4 Vols.
4. Wahbah al-Zuhaylī, *Uṣūl-al-Fiqh al-Islāmī* (Damascus, 1978).

The first work is a Shāfī ʿī exposition; the second two are Ḥanafī expositions, and the fourth is a general exposition not located in a particular legal school (*madhhab*).<sup>2</sup>

In the first chapter, I sketch the nature of the problem and tension which exist between the dictates of law and the demands of social change. This tension gives rise to two opposing views: the "immutable" and the adaptable". The protagonists of the "immutable" view assert that if the law is to retain its form as the expression of the divine command, if indeed it is to remain Islamic law, reforms cannot be justified on the ground of social necessity per se; they must find their juristic basis and support in principles which are Islamic in the sense that they are endorsed, expressly or implicitly, by the divine will. The modernists, who are the espouses of the "adaptable" view, claim that the law can be, and indeed must be, adapted to support the social upheavals and progress of modern times.

The second chapter locates and analyzes some of the provisions made in legal theory for the accommodation of changing social needs. For the purpose of this study I have chosen the doctrine of *maslahah*<sup>3</sup> (utility) and the concept of *‘urf* (prevailing norms) as examples of the provisions made by legal theory to cope with changing social exigencies.

The primary focus of the third chapter is the "leeways" within a judicial system which strictly adheres to the concept of *stare decisis* (precedent). I attempt to illustrate the inherent leeways in the "fertility" of language in which the law is packaged and point to the "barrenness" of syllogistic argument in which the concept of precedent appears to be rooted.

In the fourth chapter I deconstruct some false assumptions regarding the concept of *‘illah* (*ratio legis*) and attempt to reconstruct a notion of *‘illah* that affords the jurists ample leeways needed to accommodate social change. After illustrating the inherent leeways to be found in the legal propositions together with the inherent scope accompanying the notions of *maslahah* and *‘urf*, I proceed to evaluate the extent to which these leeways are employed in the actual judicial process of two of the world's most authoritative judicial institutions namely; al-Azhar (Cairo) and Dārul ‘Ulūm (Deoband). To do this, I analyze the fatwa (judicial decree) on organ transplantation from both these institutions. My analysis is not aimed at the outcome of the *fatwahs*, but rather at the processes involved in arriving at the particular verdicts.

In my conclusion I point to the ample provisions made by legal theory to contend with any social exigency and to the tragic neglect of their employment in the application of the law to novel situations. It is, therefore, the inconsistency between the provisions of legal theory and the absence of their application in the actual judicial process that has contributed to the current tension between law and social change.

## Notes for Introduction.

1. K. Mas'ūd, *Islamic Legal Philosophy* (Islamabad, 1977), p.24.
2. The term "legal school" is the most acceptable translation of *madhhab*. Four *Sunni* legal schools have survived. The *Ḥanafī* school was founded by Abū Ḥanīfah (d.150/767). The *Mālikī* school was founded by Mālik bin Anas (d.179/795). Muḥammad bin Idrīs al-Shāfi'ī (d.204/820) founded the *Shāfi'ī* school. Aḥmad bin Ḥanbal (d.241/855) was the founder of the fourth school.
3. The technique of *istislah* (judgment on the grounds of welfare or utility) was the most liberal principle of legal interpretation in traditional currency, and one in which human value judgments were allowed their widest role.

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# Chapter I.

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## 1. Nature of the Problem.

**T**here has always existed a tension between legal theory and social change. As divine law<sup>1</sup> is usually assumed to be unchanging, it faces the powerful challenge of social change which demands a degree of flexibility and adaptability from it.

In certain cases the impact of social change is so profound that it influences the interpretation of a legal document. This phenomenon is clearly reflected in the many United States Supreme Court rulings, where the judge's reading of the Constitution was a direct result of the impact of social change.<sup>2</sup>

A classical example is the "Brown v. Board of Education" case of 1954 in which the Supreme Court of USA upset the interpretation of the Fourteenth Amendment of the equality of races, given nearly a half century earlier.<sup>3</sup> In Brown v. Board of Education, the black plaintiffs persuaded the Supreme Court to repudiate an earlier decision, Plessy v. Ferguson (1896), in which the Court had held that racial segregation did not violate the equal protection clause of the Fourteenth Amendment if the separate facilities were substantially equal.<sup>4</sup> The plaintiffs' principal argument was that official classification based on race placed the stamp of government approval on the doctrine of black inferiority.<sup>5</sup> The Supreme Court ruled in favour of the plaintiffs, which meant that

105,000 public school students of Washington, D.C., could no longer be separated on the basis of race.<sup>6</sup> This crucial verdict was a direct result of the pressure exerted by public opinion and expectation, brought on by changing social norms.

For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.<sup>7</sup>

Modern judges, therefore, know that each application of the Constitution entails a continuous clarification of its meaning and that it is not always practical to resolve a unique issue solely on the basis of historically distant and fixed conceptions. Indeed, there are some contemporary notions of justice, like the concept of freedom of religion, that cannot be confined to eighteenth-century normative perspectives.<sup>8</sup> Thus, the conventional judge is caught between the need to conform to society's reasonable expectations which are shaped by the unfolding process of changing social norms, while bound at the same time by the general tenor of the Constitution which governs that decision. It is, therefore, an important function of the courts to act as a communication channel both to the memories and the traditions of the past and to the felt needs of the present and the future.

## **2. Islamic Law Immutable or Adaptable?**

What is clear is that all traditions, religious or non-religious, seek to



inculcate certain values and norms of behaviour, by establishing a sense of continuity with the past and an obligation to maintain such continuity, while at the same time reinterpreting those past values and norms to adapt to a novel and changing environment.

A religious tradition quite unrelated to the world in which its people seek to exist is not a tradition: it is an anachronism, at best a museum, at worst a mortuary.<sup>9</sup>

When dealing with change, it is essential to direct the process so as to remain loyal to the deepest levels of tradition and yet also to be open to the legitimate needs and exigencies of contemporary society. In this sense, it necessitates some responsible and reasoned understanding of what the authentic tradition is in order to realize legitimate goals for the immediate future. In a world of change, the survival of a tradition is inextricably linked to a strategy which constantly engages the demands made by such change. The question whether Islamic Law is adaptable or immutable, is characterized by the usual polemics that is a distinct feature of this dynamic tradition.

## **2.1 The Orthodox View.**

Most of the classical<sup>10</sup> traditional, orthodox<sup>11</sup> Muslim jurists maintain that Islamic Law is immutable and hence, not adaptable to social change.<sup>12</sup>

The protagonists of this view base their main argument on the concept

that the law is of divine origin (*wahī*). They contend that since the law is the "revealed injunction" of God, it is absolute and unchangeable. The concept of the divine nature and origin of Islamic Law underpins their view. It is argued that Islamic law is firmly rooted in Divine Revelation through the prophetic agency of Muhammad SAW. Since the law is divinely inspired, embedded in the Qurā'n and the *Sunnah*<sup>13</sup>, it is believed to be sacred, final, inerrant, eternal; and hence immutable.<sup>14</sup> A more abstract argument posited by the protagonists of this view is that Islamic Law reflects or mirrors the Will (*irādah*) of God.<sup>15</sup> This view contends that the law is thoroughly rooted in the Will of God.

The law, which is the constitution of the Community, cannot be other than the Will of God, revealed through the Prophet. This is a Semitic form of the principle that 'The will of the sovereign is law', since God is the sole Head of the Community, and therefore sole Legislator.<sup>16</sup>

This argument is reflected in the theological debate between the Ash'arīs and the Mu'tazilīs which deals with the issue of the free agency of man's acts. The Mu'tazilīs espoused the notion of free will which attributed to man the sole authority over his actions.<sup>17</sup> On the other hand, the Ash'arīs held that man is not the free agent of his acts, implying that all human acts are a direct consequence of the Divine Will. In order that man may be considered a separate entity from God, and thus have the capacity for a responsible relationship with Him,<sup>18</sup> his actions are simply "apparent occasions" of their consequences, raised to the level of free will. "Free will" in this context has no ultimate and independent reality of its own, but rather a limited psychological reality which is valid for the human conscience by virtue of "acquisition" (*kasb*)<sup>19</sup> A Muslim thus

enters into a *mīthāq*, an allegorical covenant by which he voluntarily submits to God's Will.<sup>20</sup>

The orthodox view is firmly rooted in the concept of predestination and therefore subscribes to the notion that nothing can be qualified as good or bad, but in relation to God's Will.<sup>21</sup> Furthermore, His Will can only be ascertained through revelation and not through human reason.

## **2.2 Epistemology of Islamic Law.**

The question of epistemology embraces two crucial issues. The method of knowing the law and the precise role of human reason in this exercise.<sup>22</sup> It is my contention that the extensive legal debate between the modernists and the orthodoxy on the important issue of Islamic law and social change is a direct result of their divergent views of the epistemology of Islamic law.

The dominant view clearly posits that Islamic law is not the product of human intellectual endeavour and is therefore neither shaped nor dependent on the social milieu.<sup>23</sup> As Coulson describes it:

Floating above Muslim society as a disembodied soul, freed from the currents and vicissitudes of time, it [Islamic Law] represented the eternally valid ideal towards which society must aspire.<sup>24</sup>

Islamic Law, as the product of divine inspiration and therefore, immutable, was further entrenched by the conviction of the imperfection

of human reason and its inability to apprehend by its sole powers, the real nature of the good, or indeed of any reality whatsoever. The Ash'arī view is that reason has no part whatsoever in the determination of what is good or evil without [the assistance of] divine revelation.<sup>25</sup> Since this concept of the epistemology of law denies the primary role of human reason in the process of law making, orientalist such as Schacht<sup>26</sup> and Hourani<sup>27</sup> feel that certain irrational elements have survived in Islamic law. Bousquet went as far as to claim that Islamic Law is often based upon "rationally absurd hypotheses".<sup>28</sup>

The classical debate of reason vs revelation represents the zenith of a process whereby the specific terms of the law came to be conceived as the irrevocable and immutable Will of God.<sup>29</sup> In contrast with legal systems based upon human reason and utility, a system of divine law such as the Islamic one, possesses two major distinctive characteristics. Firstly, it is a rigid and immutable system, embodying norms of an absolute and eternal validity which are beyond the jurisdiction of any legislative authority. Secondly, for the many different peoples who constitute the 'ummah (community) of Islam, the divinely ordained Shari'ah represents the standard of uniformity as against the variety of legal systems which would be the inevitable result if law were to be the product of human reason shaped by, and in response to circumstances and the particular needs of given communities.<sup>30</sup> It is clear that such an epistemology must in theory promote rigidity and uniformity. However, when scrutinizing the Islamic legal tradition, diversity rather than uniformity is its conspicuous hallmark. Any substantial work on Islamic law is virtually saturated with polemics.<sup>31</sup> Hence, diversity rather than uniformity is the distinct characteristic of Islamic law. The notion of a uniform Shari'ah is seriously qualified by wide variations of opinion between different schools and individual jurists.<sup>32</sup>

If we accept the notion that human reason plays an insignificant role in the determination of the law, then why is it that diversity which is the fruits of human reason, is so pervasive? Why this apparent discrepancy between ideal and reality, or theory and praxis? It is in the answers to such crucial questions that I feel the solution to the problem of the application of the law lie. The immutability view is primarily based upon the ideal theoretical conception of divine law without much reference to the world of reality. Hence, any deep analysis of the application of such an idealistic concept will reveal the cleavage between theory and application (praxis). The assertion of uniformity is therefore severely undermined by the diversity of disputed law.

### **2.3 Islamic Law and its Definition.**

Another argument forwarded in favour of the concept of immutability of Islamic law is based upon the definition of the law. The law is defined as a code of morals and ethics, firmly entrenching the concept of immutability as ethics and morals are not adaptable. Since law and morality have a great deal in common, they are often confused.<sup>33</sup> This led many scholars such as Gibb to define Islamic Law as a system of ethics.<sup>34</sup> He bases his main argument on the fact that the Islamic classification of categories of action are moral, and not juridical. The five categories listed are: obligatory, recommended, indifferent (permissible), reprehensible and forbidden. These categories are moral and ethical rather than juridical.<sup>35</sup> This view is further entrenched by the Islamic term used for a penalty; *ḥudud Allāh* (the limits set by God) which clearly emphasizes the fact that an offence has been committed against God and it is His sole prerogative to impose punishment.<sup>36</sup>

Now, while it is correct to assert that Islamic law cannot be separated from morals, it also embraces a "devotional" (*ʿibādah*) dimension which is neither devoid of morals nor entirely based upon it.<sup>37</sup> Even in the west, when certain jurists have militated for the separation of law from morals, there was an immediate, strong reaction against any such moves. What clearly emerges from the classical Hart- Fuller debate is the fact that the organic relationship between law and morals is of such a nature that any attempt at their separation (Hart) must evoke a counter attempt (Fuller). Hence, the utilitarian distinction between "what the law *is* and what it *ought* to be"<sup>38</sup> cannot thus be applicable to Islamic law.

Although there is a distinction between a legally enforceable rule and the morally desirable rule, it is not a distinction between a rule which is observed in practice as opposed to one which is not.<sup>39</sup> Real values and norms around which a society structures its life, are not always and merely those which are enforceable in the courts. Had the application of the law been dependent upon the coercive force of the courts, it would have waned in places where the courts have no jurisdiction. There are undoubtedly more powerful and charismatic forces operative in society that secure the observance of standards of behaviour than legal coercion.<sup>40</sup> In traditional Islamic society, the consciousness, recognition and acceptance of the standards of religious values and morality were instilled into the masses through a well orchestrated network of influences, inter alia: the great influence wielded by charismatic men of religion in public and private office, the religious scholars and teachers in the educational establishments, the imams in the many mosques and through the institution of the Friday sermon (*khutbah*), and finally through the rulings of the *muftīs* (jurisconsults). I am therefore in agreement with those scholars that Islamic law is both a code of law and a code of morals. It embraces a comprehensive scheme

of human behaviour which derives from the Will of God, which incorporates a legal as well as a moral dimension.<sup>41</sup> Scholars have used the definition of Islamic law as a code of morals to further substantiate their view that Islamic law is immutable.<sup>42</sup>

The main arguments of the protagonists of the immutability of Islamic law can be summed up as follows:<sup>43</sup>

- 1.) Since Islamic law is rooted in a divine source, rulings are eternal, absolute, final, and unalterable.
- 2.) Islamic law is not a product of human endeavor, hence it is beyond human tampering done in the name of change.
- 3.) Islamic law is a code of ethics or morals which must remain consistent and hence immutable.

These arguments are then the basis for the view that Islamic law is immutable and hence not adaptable to social change.<sup>44</sup>

### **3. Adaptability View.**

It is crucial to note that the term "adaptability" has been used by modern scholars in two senses. For the purpose of clarity and accuracy, the two uses of the term must be distinguished. One use of the term means "the possibility of expanding the already existing body of the law" to accommodate current exigencies. In the second sense, it means "the openness of this body of law to change according to the social needs and conditions". The former sense of the term is hardly in question here. With the exception of a few literalists, "adaptability" in the first sense has always been allowed by all jurists. In actual fact, *qiyās* (analogy)<sup>45</sup> arose from this meaning of adaptability.<sup>46</sup>

The second sense does not merely connote the "extension"<sup>47</sup> of the existing law, but implies that the development of the law takes place around the broad principles laid out by the Qur'ān and the *Sunnah* (primary sources). Law is thus continuously formulated in the light of the primary sources to cope with new contingencies and exigencies.

### 3.1 Legal Modernism.

According to the classical tradition as we have already seen, law is imposed from above and postulates the eternally valid standards to which the structure of state and society must conform. In the modernist approach, law is shaped by the needs of society; its function in society entails the need to solve social problems.<sup>48</sup> Yet, the modern Muslim scholars concede that the needs and aspirations of society cannot be the exclusive determinant of the law; they can legitimately operate only within the bounds of the norms and principles irrevocably established by the divine command. And it is precisely the determination of these limits which is the bone of contention.<sup>49</sup> The clash, therefore, between the allegedly rigid dictates of the traditional law and the demands of modern society poses for both liberal and orthodox scholars, the fundamental problem of *uṣūl* (principle). If the law is to retain its form as the expression of the divine command, if indeed it is to remain Islamic law, reforms cannot be justified on the ground of social necessity per se; they must find their juristic basis and support in principles which are Islamic in the sense that they are endorsed, explicitly or implicitly, by the Divine Will.<sup>50</sup> It therefore becomes the task of the modern scholar to first establish the nature of the law in terms of rigidity, and secondly



to identify those legal as well as extra-legal principles that could be appropriated in order to usher in the desired changes.

The Reformers acknowledged that many of the existing laws, in their traditional form were obsolete; but because they were based on religious<sup>51</sup> (divine) principles, they could not be discarded easily. On the other hand, contemporary social needs called for a type of radical adaptation which meant the renunciation of established legal principles. In order to justify the departure from established norms, the idea of the "flexibility" of the sources was entertained. In its extreme form, legal modernism rests its case upon the notion that the Will of God was never expressed in terms so rigid or "immutable" as the classical doctrine maintained, but that it enunciates broad general principles which admit of differing interpretations and varying applications according to the circumstances and dire needs of the time. Legal modernism, therefore, is a movement towards an historical exegesis of divine revelation.<sup>52</sup>

### **3.2 Divine Origin of Islamic Law and Adaptability.**

In response to the argument of Islamic law being rooted in divine sources, the protagonists of the adaptability-view maintain that the amount of strictly legal material existing in the revealed sources is very limited in comparison to what developed out of it. Therefore Leon Ostrorog<sup>53</sup> and S.G. Fitzgerald<sup>54</sup> feel that the whole body of Islamic law is not "revealed" but rather developed as a result of human endeavour. They concede that systems of law tend to be perfect and portrayed to be permanent, hence a sense of immutability gathers around the concept of law. But they also maintain that changing social needs challenge such

an attitude and law in practice almost always succumbs to social needs. Various systems devise different methods to meet such challenges. For instance, Roman Law resolved this problem by distinguishing between *jus civile* which was strict and *jus honorarium* which was flexible<sup>55</sup> In Common Law flexibility was achieved through Equity.

Modern scholarship has increasingly suggested that Islamic law did evolve methods to adapt legal theory to changes. The immutability school held to the concept that the work of God in history is embodied in fixed institutional forms, which were as a consequence changeless and permanent. If they were in truth divine, they should be, like God, eternal, everlasting and beyond relativity, time and change. The adaptability school, on the other hand, maintains that the sacredness of Islam is not found in the changelessness of her forms, but in her fidelity through changing forms to her mission in the world and so to the final purpose of God. Furthermore, it is contemporary life that must provide the experiential content and the conceptual forms that legitimate the world view lest the men and women who seek to live in their terms find them empty, meaningless, irrelevant and impotent.<sup>56</sup> Therefore, a rift certainly developed between the terms of the classical law and the varied and changing demands of Muslim society; and, where the *Shari'ah* was unable to make the necessary accommodation, local customary law continued to prevail in practice.<sup>57</sup>

### 3.3 The Role of Reason in Determining the Law.

Western scholarship has demonstrated that *Shari'ah* law originated as the implementation of the precepts of divine revelation within the

framework of the current social milieu, and thus provides the basis of historical fact to support the philosophy underlying legal modernism. Coulson maintains that once the classical theory is seen in its historical perspective, as simply a stage in the evolution of the *Shari'ah*, modernist activities no longer appear as a total departure from the one and only legitimate position, but preserve the continuity of Islamic legal tradition by continuing the attitude of the earliest jurists, and reviving a corpus whose growth had been artificially arrested.

Modernist activities, therefore, can find their most solid foundation in a correct appreciation of the historical growth of *Shari'ah* law. As this modernist movement gathers momentum and a new era in Muslim jurisprudence is ushered in, legal history assumes a role of vital and previously unparalleled significance. The Modern Muslim jurist of today cannot afford to be a bad historian<sup>58</sup>

On the basis of the above argument, the reformers concluded that rigidity of Islamic law was not so much a result of the nature of law, as it is the direct result of the actions of the earlier jurists. There arose an acute awareness among the jurists to protect the idealism of their concept of ultimate sovereignty from the corruptions to which it would inevitably be exposed during the process of interpretation and application.<sup>59</sup> In order to insulate the law against abuse and arbitrary interpretation, post-medieval jurists erected a solid wall around the works of the classical jurists. It would seem that the latter jurists indirectly torpedoed any attempt at "new" *ijtihad*<sup>60</sup> by placing severe restrictions upon its exercise. This was accomplished by systematically lengthening the list of qualifications needed to entitle one to *ijtihad*. Since the required qualifications could almost never be found in one single scholar, the concept that the "doors of *ijtihad* are closed", gained currency.

#### 4. The Point of Convergence.

Despite the differing views espoused by the two opposing groups, they do not dispute the fact that social changes have occurred in Islamic history and that legal changes did take place. But whereas the adaptability view relates these mutations to the flexible nature of Islamic law, the immutability view does not.

In classical jurisprudence we find two types of laws. Those that are directly based upon the revealed texts (*manṣūṣ ʿalayhī*) like the duty to perform the five daily prayers and the prohibition of fornication and adultery. The other type is based upon individual interpretation (*mujtahid fihī*), for example, the law that governs the precise time of the late afternoon prayer (*ʿaṣr*).<sup>61</sup> The immutability of the former is not in dispute. Even those who subscribe to the adaptability view regard those laws that are based upon direct and explicit divine injunctions as permanent and beyond change, hence, on this point there is general agreement.<sup>62</sup> It is with regard to the *mujtahid fihī* laws that the protagonists of the adaptability view contend that change is both permissible and imminent.

The immutability view, as we have seen, does not in theory recognize that Islamic law is subject to change because it subscribes to the notion that precedent is binding.

Therefore the debate is then not about the historicity of legal changes, but about the theory of Islamic law regarding these changes.<sup>63</sup> Both

positions, however, admit the view of the opposite group on some points. For instance, the immutability view submits to its opponent in maintaining that Islamic law was adaptable in its formative period.<sup>64</sup> The adaptability view on the other hand admits that after the "closing of the doors of *ijtihād*", Islamic law showed less inclination to adaptability because the concept of *taqlīd* gained currency.<sup>65</sup>

It would thus seem that the reformer's view of legal theory, which posits the notion that fixed authoritative legal principles are capable of growth, has a great deal in common with the American concept of Constitutionalism. Although the American Constitution is "fixed", its inherent leeways often afford the judge the room needed to apply the law with optimum benefit. The conscientious judge realizes that his private views are subordinate to a socially acceptable standard that requires impartiality. The judge's duty is not to inject peculiar meaning or personal bias, but rather to extract authentic meaning from the text which is the valid source of the law. Hence, a judge, having a hermeneutical perspective, is never completely free of the general tenor of the text, since it (text) suggests the parameters and factors that he must take into account. This hermeneutical exercise requires both will and initiative, but it is incorrect to always equate them with improper subjectivism. His judgment is expected to be verifiable as a valid norm by another valid norm contained within the Constitution. Although he is often compelled to look outside the Constitution, he is looking outside to determine the acceptable meaning of the language within. His challenging task is to integrate the intended meaning of the Constitution with its perceived applicable and socially acceptable meaning.

A process is at work as judges attuned to the public's social conscience, try to preserve the Constitution while new developments of law are generated. It is by means of this process that the impartial judge seeks

the most authentic meaning of the Constitution; but his prejudices, often reflecting truth, are the energies that constitute his mind. Thus, the eventual ruling, if certain institutional technical requirements are met, is neither solely objective nor subjective, but authoritative. Modern Islamic scholars, like judges, know that each application of the Divine Law or Constitution entails a continuous clarification of its meaning and that it is not always practical to resolve a unique issue solely on the basis of historically distant conceptions. What is called for is a decision that is relevant to contemporary experience, which is at the same time bound to the general tenor of the Constitution. As Justice Evans Hughes once remarked: "We are under the Constitution, but the constitution is what the judges say it is."<sup>66</sup>

The reformers recognize the importance of changing social needs on the one hand, and realize on the other hand, that the needs and aspirations of society cannot be, in Islam, the exclusive determinant of the law; they can legitimately operate only within the bounds of the norms and principles irrevocably established by the divine command. It is the setting of limits on social demands that are acceptable to the dictates of the divine command, that characterizes the debate between the traditionalists and liberals, each espousing different criteria of acceptability.

## NOTES FOR CHAPTER I.

1. Islamic law refers to those rules and regulations (*aḥkām*) that are based upon divine authority, whether directly or indirectly. The sources (*maṣādir*) of this law are categorized into two. The first source of the law is divine revelation (*waḥī*) and the *sunnah* of Prophet Muhammed SAW. This original source of the law is known as the *qatʿiyāt* (certain, definite). Those laws which are derived through the use of the man's rational senses, (*ʿaqliyāt*) forms the second source of the law. The second source is directly dependent upon the existence of the first and interacts with it to form the basis for the extension of the first. The second could not exist without the first. This source is known as the *ẓanniyāt* (cognitive or conceived). *Al-ijmāʿ* (consensus), *ijtihād* (personal discretion), *qiyās* (analogy) and *maṣlaḥah* (utility) are all based upon the second source. (ʿAbd al-Raḥmān Sābūnī, *Al-Madkal ilī dirāsah al-Fiqh al-Islāmī* (Damascus, 1978), Vol.1, p.23.
2. The genius of the Constitution is its adaptive quality which enables judges to affirm a novel conception of law, that appears to change the text's original meaning and at the same time, maintaining its binding quality which restricts judges from steering away from the general tenor of the Constitution. Although the Constitution is "fixed", it still possesses inherent leeways which affords the instant judge enough room to accommodate certain changes. In the case of the Qurʾān, which is the Muslim jurists's "constitution", a similar situation is experienced where, despite the appearance of "fixed" injunctions, inherent leeways results in a proliferation of diverse interpretations. Owing to this similarity I have on occasions used the American Legal System as a source of analogy. For further study of how judges interpret this "fixed" Constitution to accommodate social change, see: J.A. Garraty, *Quarrels That Have Shaped the Constitution* (New York, 1964).
3. W. Friedmann, *Law in a Changing Society* (London, 1972), p.27.
4. Raymond Wolters, *The Burden of Brown* (Knoxville, 1984), p.4.
5. *Ibid.*, p.9..
6. *Ibid.*, p.4.
7. Brennan, *The Constitution of The United of States* p.7
8. The original concept of freedom of religion is today interpreted as meaning, freedom from religion.
9. Gilkey, *Catholicism Confronts Modernity, A Protestant View* (New York, 1975), p. 111.

10. The word "orthodox" seem to have gained a multiplicity of different connotations. It is therefore essential that I specify precisely what I mean by this term. The definition of this word "adhering to the accepted or traditional and established faith" (*Great Illustrated Dictionary* [London, 1984]) is, as one can see fairly broad. My use of the word is intended to connote the established, conservative, puritanical, "received view" of the *Sunnī* Ash 'arī school.
11. By classical I mean, time honoured, well-established, celebrated, acclaimed, illumed scholars. Medieval (between 4/10th and 10/16th century) scholars such as al-Ghazzālī is an example par excellence of what I mean by "classical" scholars.
12. Sa 'īd Ramaḍān Buṭī, *Ḍawābiṭ al-Maṣlaḥah* (Beirut, 1977), p.285. Khālīd Mas 'ūd, *Islamic Legal Philosophy*, p. 1.
13. For a comprehensive and very detailed study of the exact meaning of the term *Sunnah*, refer to Fazlur Raḥmān, *Islamic Methodology in History* (Islamabad, 1984), p.1-82. For our immediate purpose the term *Sunnah* will refer to the sayings, tradition and the customs of the Prophet. I also used the term *Ḥadīth* interchangeably with *Sunnah*.
14. Sa 'īd Ramaḍān Būṭī, *Ḍawābiṭ al-Maṣlaḥah*, p.285  
 Sa 'īd Ramaḍān, *Islamic Law, Its Scope and Equity* 1970, pp.25-26.  
 M. Khaddūrī, "From Religion to National Law" J.J. Thompson (ed.). *Modernization of the Arab World*. (Princeton: Nostrand, 1966), p.38.  
 H.Lammens, *Islam, Beliefs and Institutions* (London, 1929), p.82.  
 N.J. Coulson, *A History of Islamic Law* (Edinburgh, 1964), p.12.  
 H.A.R.Gibb, *Islamic Society and the West* (Toronto, 1957), p.114.  
 J.N.D. Anderson, *Islamic Law in the Modern World* (New York, 1959), p.17.
15. Sa 'īd Ramaḍān, *Islamic Law, Its Scope and Equity* 1970, p.15.
16. H.A.R. Gibb, *Mohammedanism*, p.99.  
 Sa 'īd Ramaḍān, *Islamic Law, Its Scope and Equity* 1970, p.12.
17. For a thorough detailed discussion on the question of predestination and freewill, refer to Harry Wolfson, *The Philosophy of Kalām* (London, 1976), pp.601-717.
18. M.H. Kerr, *Islamic Reform* (California, 1966), p. 20.
19. Al-Mawardī, *al-Aḥkām al-Sultāniyya*, Leon Ostrorog, (transl.), (Paris, 1906), p. 68-71.



20. "Am I not thy Lord? Yes they replied." (7:172) The whole concept of *mithāq* is based upon the implications of this verse. ʿAbd al-ʿAzīz bin Aḥmad al-Bukhārī, *Kashf al-Asrār* (Beirut, 1974), Vol. 4, p.238. Louis Gardet, *La Cite musulmane* (Paris, 1954), p. 183.
21. Sa ʿīd Ramaḍān Būṭī, *Dawābiṭ al-Maṣlahah*, pp.12-14  
ʿAbd al-ʿAzīz bin Aḥmad al-Bukhārī, *Kashf al-Asrār*, Vol. 4, p.230.  
H.A.R. Gibb, *Studies on the Civilization of Islam* (Boston, 1968), pp.204-206.
22. K. Mas ʿūd, *Islamic Legal Philosophy*, p. 8.
23. ʿAbd al-ʿAzīz bin Aḥmad al-Bukhārī, *Kashf al-Asrār*, Vol. 4, p.230 p.230. Also see Mullah Jewan, *Nūr al-Anwār* (Khanpur, 1958), p.281. This view is further entrenched by the Qurʾānic verse: "It is not fitting for a believer, man or women, when a matter has been decided by God and his Apostle, to have any option about their decision." (33:35)
24. N.J.Coulson, *A History of Islamic Law*, p.2.
25. ʿAbd al-ʿAzīz bin Aḥmad al-Bukhārī, *Kashf al-Asrār*, Vol.4, p.230. Mullah Jewan, *Nūr al-Anwār*, p.281. H.A.R. Gibb, *Mohammedanism*, p.90.
26. J.Schacht, *Introduction to Islamic Law* (Oxford, 1966), p.202-203.
27. G.F.Hourani, *Islamic Rationalism* (Oxford, Clarendon, 1971), p.8-14.
28. G.H. Bousquet, *Precis de droit musulman* (Algiers, 1947), p.44. Since the latter argument impinges upon another classical debate namely, reason vs revelation, which is clearly beyond the immediate scope of this study, I merely wish to record the view without engaging the argument.
29. ʿAbd al-ʿAzīz bin Aḥmad al-Bukhārī, *Kashf al-Asrār*, Vol. 4, pp.230-231. Mullah Jewan, *Nūr al-Anwār*, p.281. N.J. Coulson, *A History of Islamic Law*, p.4.
30. N.J.Coulson, *A History of Islamic Law*, p.5.
31. A typical example of a work on Islamic law is Ibn al-Humām's *Fath al-Qadīr* 10 volumes (Cairo, 1970).
32. N.J.Coulson, *A History of Islamic Law*, p.5.
33. K. Mas ʿūd, *Islamic Legal Philosophy*, p.9.
34. H.A.R. Gibb, *Islamic Society and the West* (Toronto, 1957), p.118.

35. *Ibid.*, p.118.
36. J.Schacht, *Introduction to Islamic Law*, p.207.
37. The law that prescribes the slaughtering of an animal (*qurbānī*) during tenth, eleventh or twelfth day of Dhil Ḥajj (eleventh month of the Muslim calendar) could hardly be said to be based entirely upon moral considerations.
38. For a comprehensive view of this debate on positivism and the separation of law and morals, see H.L.A. Hart, "Positivism and The Separation of Law and Morals" in *Harvard Law Review* Vol. 71, Feb. 1958, p.593-629. Also see L.L.Fuller, "Positivism and Fidelity to Law - A Reply to Professor Hart" *ibid.*, p.630-672.  
This famous and classical Hart Fuller debate which rocked the legal community, continues today, see Hugh Corder (ed) *Law and Social Practice in South Africa* (Cape Town, 1988), p.123-180.
39. N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago, 1969), p.84.
40. *Ibid.*, p.84.
41. ʿAbd al- ʿAzīz bin Aḥmad al-Bukhārī, *Kashf al-Asrār*, Vol. 4, pp.230-231.  
N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, p.79.
42. M.K. Mas ʿūd, *Islamic Legal Philosophy*, p.9.
43. Most of the orthodox jurists subscribe to the immutable view. see: Sa ʿīd Ramaḍān Būṭī, *Dawābiṭ al-Maṣlaḥah*, p.285. Many orientalist such as Gibb and Schacht also form part of this group.
44. M.K. Mas ʿūd *Islamic Legal Philosophy*, p.1.
45. In order to extend the law, textual evidence (naṣṣ) was the necessary basis. Hence, the method of *qiyās* was developed in order to extend the law. It rested upon the assumption that in a given law revealed in the Qurān or Ḥadīth, a particular attribute of the subject ruled upon is the ʿillah (*ratio legis*) or governing consideration, and by establishing what this ʿillah is, the law could be systematically extended to other comparable situations.
46. K. Mas ʿūd *Islamic Legal Philosophy*, p.21
47. The process of extending the law implies that the premises from which the law is to be extended already exists and is known.
48. N.J. Coulson, *A History of Islamic Law*, p.5.

49. *Ibid.*, p.6.
50. *Ibid.*, p.7.
51. M.H. Kerr, *Islamic Reform*, p. 3.
52. N.J.Coulson, *A History of Islamic Law*, p.7.
53. Leon Ostrorog, *The Angora Reform* (London, 1927), p.19.
54. S.G.Fritzgerald, "Nature and Sources of Sharīʿah", in *Law in the Middle East* (Toronto, 1975), p.87.
55. M.K. Mas ʿūd, *Islamic Legal Philosophy*, p.18.
56. L. Gilkey, *Catholicism Confronts Modernity*, p.12.
57. N.J. Coulson, *A History of Islamic Law*, p.5.
58. *Ibid.*, pp.5-7.
59. For further study of the orthodox jurists' activities, see M.H. Kerr, *Islamic Reform*, pp. 55-102.
60. The term *ijtihād* literally means an extreme struggle. In Islamic legal theory the term is used to describe the scholar's employment of intellectual effort or personal discretion in arriving at the most authentic interpretation on matters pertaining to religion. For a detailed discussion on the meaning of *ijtihād* see: Muḥammad Taqī Amini, *Fundamentals of ijtihād* (Bombay, 1986), pp.1-8.
61. *Tatbīq Sharīʿah al-Islam* (Riyādh, 1984), p.114.
62. Sa ʿīd Ramaḍān Būṭī, *Dawābiṭ al-Maṣlahah*, p.279, p.283.

Ziya Gokalp (d.1343 A.H.) attempted to give the concept of ʿurf a different dimension. He distinguishes the social elements of the law from the traditional (devotional) elements.

"The sources of the Sharīʿah are two: traditional Sharīʿah and social Sharīʿah. But social Sharīʿah is in a continuous process of becoming, like all social phenomena. As a result, that part of *fiqh* is not only susceptible to evolution in accordance with social evolution, it has to change. The fundamentals of *fiqh* relating to *naṣṣ* are constant and immutable, whereas the social application of these fundamentals based on ʿurf and *ijmāʿ* have to adapt themselves in accordance with the necessities of life." Ziya Gokalp, *Turkish Nationalism* (London: George Allen and Unwin Ltd, 1959), p.196. He lays great stress on the importance of ʿurf, because it constitutes the living law of the community. According to him, a law that is dead or is an anachronism cannot be expected to regulate the life of a community.

63. M.K. Mas 'ūd, *Islamic Legal Philosophy*, p.22.
64. Especially the first three centuries, when the "doors of *ijtihād*" were still wide open. As the concept of the closure of the doors of *ijtihād* gained momentum, the emphasis on *taqlīd* grew stronger.
65. M.K. Mas 'ūd, *Islamic Legal Philosophy*, p.18.
66. Raymond Wolters, *The Burden of Brown* (Knoxville, 1984), p.3.

## CHAPTER II.

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## **Chapter II.**

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**A**s Islam began to expand its geographical boundaries, it came into direct contact with a multiplicity of differing cultures and milieus. In order to effectively govern these conquered nations, it meant taking cognizance of the peculiarities and needs of those cultures. To actualize Islamic ideals in these differing real life situations, meant inter alia, the employment of skills of finding the correct synthesis of Islamic ideals and contemporary experience reflected in social needs.

### **1. Translation of Ideal into Reality.**

For the Muslim, Islam represented the decisive intervention of the supernatural order into the natural order, so as to guide, prepare, and ultimately translate every ideal in the supernatural order into the natural order of lived experience. This intervention of supernatural into nature and history is the sole basis for the power, authority, law, and mission of religion here on earth.<sup>1</sup> This dichotomy between the sacred and the profane also pervades the legal sphere and jurists found themselves increasingly under pressure to translate these ideals into livable reality. Thus, it became their duty to reconcile these two sets of contrasting elements. The traditional way was to insist on implementing the ideal exactly as it was originally formulated. This was so even though the ideal was formulated in response to a different set of social needs and behavior.

The Qur'ān, which is the embodiment of the ideal, was revealed in response to certain real life situations. Hence the *asbāb al-nuzūl* (occasions of revelation) form an integral part of the understanding of the revealed ideal. Any extrapolation of laws, values and norms from the revealed ideal, had to take into account the real life situation of the community which sought to implement those laws and values. Any radical difference in the real life situations of the different communities, as was experienced when the Muslims began to conquer new lands, was bound to influence the hermeneutical exercise. An example of this was the development of different legal views and opinions which emerged from the different geographical positions. On many issues the jurists of Medina held views that were different to those of the jurists of Iraq and Syria on the same issues.<sup>2</sup>

Gradually, due to the rapid change in social conditions, the disparity between the ideal and reality began to increase, and the juristic exercise of "translating" the ideal into practical reality was failing. People began to seek their inspiration elsewhere.<sup>3</sup> This state of affairs precipitated the move towards finding means and ways of adapting and distilling from contemporary life and experience whatever spiritual essence these may possess. In other words the reversal of the above procedure which insisted on the implementation of the ideal, irrespective of its real life setting, was considered. This meant, translating or more correctly, distilling certain contemporary realities into the ideal. Distillation involves consideration and careful reflection of the essential and crucial experience of all contemporary and prevailing incarnations and the extrication and drawing from them the essence which is then sanctioned and legitimized. Distillation comprises of a dual process; the process of extrication and the process of legitimation. This legitimation is done through the establishment of compatibility and integration with the

*maqāṣid* (intent) of the *dīn* (religion). Reinterpreting and reappropriating the contemporary lived experience so as to reflect congeniality and compatibility with the *maqāṣid* is a process that is not only vital for the survival of a tradition but also "enriches the content of the tradition and develops its creative power in human existence." <sup>4</sup>

### 1. 1 Qiyās as a Legal Principle for Extending the Law.

As the Islamic legal system developed and was exposed to varying conditions and different environments, the need to apply the law to novel situations began to increase at a rate where it became necessary to devise a systematic methodology for drawing conclusions from the primary sources (Qur'ān and *Sunnah*).

The chief tool employed in this methodology was the system of *qiyās*.<sup>5</sup> Thus, it became necessary, when confronted by a new problem, to draw parallels between the instant problem and its equivalent in the sources on the basis of their similarity. The similarity was determined by a common denominator, the *‘illah* (*ratio legis*). Once it was established that both cases, the instant and the original, share the same *‘illah*, the original ruling was applied to the instant case, thus ensuring that the judgment decreed by God was extended to all cases of the same genus. Legal theory developed a coherent body of principles and rules designed to govern the procedure of *qiyās*, especially, as we will shortly see, the process of identifying and establishing the *‘illah*.<sup>6</sup> This was crucial because failure to strictly regulate the process of extrapolating the *‘illah* would inevitably lead to arbitrary rulings based upon personal opinions. To the extent that the process of extrapolating the *‘illah* could be brought



under control, to that extent would the application of the law to novel situations be safeguarded against arbitrary judgment. The only conceivable means of extending the divine origins of the law to new rulings, was the establishment of a valid connection between the two. That connection was the *‘illah*, the *ratio* for which God decreed a particular command or judgment.

The concept of *qiyās* received official status as an independent legal principle because it was in conformity with the legal norm of distilling from the "top" i. e. textual evidence being the exclusive basis and an integral component of the process of *qiyās*. At most, *qiyās* was able to serve as an extension of the law from the realm of the known sacred to the realm of the unknown real on the basis of a common *‘illah* that exists between the two. However, in reaction to criticism of arbitrariness, the doctrine of *qiyās* was soon placed in the custody and protection of strict formality.<sup>7</sup>

What clearly emerges from a study of the history of Islamic legal theory is that on the one hand, there existed the dire need to adapt the Islamic legacy to the demand of changing social exigencies, while on the other hand, there was a fear that such adaptation may destroy the sanctity of the Law. The concept of *ra’y* (personal opinion) gained considerable currency during the formative period of Islamic legal theory, but the diversity of laws that resulted from the exercise of *ra’y* which characterized the rulings of the *qādīs* and *muftīs* in various cities,<sup>8</sup> was soon brought under the aegis of the stricter, more systematic, and less arbitrary method of *qiyās*. *Qiyās* was not considered as a method of "adapting" the law to meet the need but essentially as a method of "extending" the law to different circumstances.

In order to extend the law, textual evidence (*naṣṣ*) was the necessary

basis. Hence, the method of *qiyās* was developed in order to extend the law. It rested upon the assumption that in a given law revealed in the Qur'ān or *Ḥadīth*, a particular attribute of the subject ruled upon is the *'illah* (*ratio legis*) or governing consideration, and by establishing what this *'illah* is, the law could be systematically extended to other comparable situations.<sup>9</sup>

In the case of adapting the law to accommodate social needs, direct textual evidence was not a prerequisite. What was needed was to establish the clear intent and spirit (*maqāṣid*) of the law so as to apply it to novel situations.<sup>10</sup>

## 2. Adapting the Law : Maṣlaḥah.

In the search for answers to the pressing social needs and different demands made by communities in different contexts, principles and legal guidelines were developed by the early jurists. These legal principles were aimed at directing the judicial process so as to remain loyal to the deepest levels of tradition, while at the same time seeking to accommodate social needs. One such principle which developed out of the dire need to accommodate current exigencies, was the principle of *maṣlaḥah*.<sup>11</sup>

Etymologically the word *maṣlaḥah* is the infinitive noun of the root *s-l-h*. The verb *ṣalaḥa* is used to describe something that becomes good, just, virtuous, honest, or uncorrupted. It would seem that *maṣlaḥah* became a principle of legal reasoning<sup>12</sup> because it is argued that good is lawful and what is lawful must be good. This type of reasoning gained currency

during the formative period of *fiqh*.<sup>13</sup> This concept of *maṣlaḥah* began to be developed by the classical jurists to an extent that the law (*aḥkām*) was conceived by the majority of jurists to be founded upon *maṣlaḥah*.<sup>14</sup>

It would appear that although many jurists use the term *maṣlaḥah* and *maṣlaḥah al-mursalah* interchangeably, there is however a difference between the two. In terms of legal theory (*uṣūl al-fiqh*), the term *maṣlaḥah* refers to general utility, benefit, and welfare, which are directly endorsed by the original sources; Qur'ān and *Sunnah*.<sup>15</sup> The term *maṣlaḥah al-mursalah* refers to that benefit which is neither directly sanctioned nor prohibited by the *aṣl* (original sources).<sup>16</sup> An example of *maṣlaḥah al-mursalah* is the compilation of the Qur'ān into one complete text. The benefit of this compilation is neither sanctioned nor prohibited by the *aṣl*.<sup>17</sup>

In its formative period, a concept emerges in response to a need and is qualified by a bare minimum of restrictive controls. Gradually, as the concept blossoms into a fully fledged principle and gains prominence and acceptability in a wider sense, an accompanying fear of corruption enters and we find more and more restrictive qualification being placed upon the concept to control its application. This development is integral to any doctrine in the process of formulation. This "tightening up" phenomenon is clearly traceable in the case of the doctrine of *ijtihād*. The right to exercise *ijtihād* was conferred upon Mu 'ād bin Jabal by the Prophet without any clear restrictions.<sup>18</sup> Since then, the doctrine of *ijtihād* has undergone a major reassessment and "tightening up", culminating in a highly restricted field of activity, governed by a rigid code of strictures.<sup>19</sup>

In the case of *maṣlaḥah* the process of "tightening up" was born out of the need, inter alia, to preclude any arbitrary and unrestricted use of lenien-

cy. In the absence of such restrictive qualification, the concept would most certainly be exposed to abuse which runs counter to the purpose for which it was developed.<sup>20</sup>

## **2. 1 Application of Maṣlaḥah.**

According to Imām al-Ḥaramayn al-Juwaynī (438/1047) three different positions emerged with regard to the application of the doctrine of *maṣlaḥah*.<sup>21</sup>

Some Shāfi'īs and *mutakallimūn* (dialectical theologians) only accepted the concept of *maṣlaḥah* if it was rooted in a specific textual basis (*naṣṣ*). If *maṣlaḥah* could not be corroborated by, or contradicts textual evidence, it was considered invalid. This is then the one extreme position that restricted the application of *maṣlaḥah*.<sup>22</sup> It rejects the idea of giving preference to *maṣlaḥah* in direct opposition to *naṣṣ* because such an exercise will tantamount to legislating (*tashrīʿ*), a prerogative which God alone possesses.<sup>23</sup> Also among this group are the Ḥanbalīs.<sup>24</sup>

The second group, divided into two, prefers (*tarjīḥ*) *maṣlaḥah* over *naṣṣ*. Some maintain that when the *maṣlaḥah* is affirmed by the general tenor of the *Sharīʿah*, then such a *maṣlaḥah* is conceived to be "sanctioned" by the *Sharīʿah*. This means that if it clashes with a legal proposition which was not directly recorded in the *nass* (*qatʿī*) but was rather inferred (*ẓannī*) then preference ought to be given to the *maṣlaḥah*. Among this group are the Ḥanafīs and the Mālikīs.<sup>25</sup>

Abū Ḥanīfa sanctioned the practice of giving *zakāt* to Banū Hāshim

despite a clear ruling of the Prophet against such an act.<sup>26</sup> The prophet is reported to have said: "[The consumption of] . . . [*zakāt*] is not permissible for Muḥammad and his progeny because it is the *awsākh* (dirt, filth) of man."<sup>27</sup> This is a clear example where Abū Ḥanīfah ruled in favour of *maṣlaḥah* ( *istiḥsān* ) despite the existence of conspicuous textual evidence to the contrary.

The first Caliph, Abū Bakr declared war upon those "Muslims" that refused to pay *zakāt*, despite the prophetic saying: I was instructed to engage in war against men until they declare, there is no God but Allah, thereafter, their lives and wealth are safe.<sup>28</sup>

The other section of the group that prefers *maṣlaḥah* over *naṣṣ*, feels that *maṣlaḥah* is the very quintessence of religious law. Religious law was founded upon the principle of *maṣlaḥah*, therefore it must assume primary status. Najm al-Dīn al-Ṭūfī (716/1316) is among the most famous of this group.<sup>29</sup> This view accords *maṣlaḥah* the status of an independent legal principle.<sup>30</sup> This meant that the application of *maṣlaḥah* was valid even though it contradicted textual evidence. Scholars have regarded al-Ṭūfī's extreme position on the issue of *maṣlaḥah* with severe skepticism. They ruled that his position contradicts the general consensus and therefore must be rejected. This position was also attributed to Mālik to a lesser degree.<sup>31</sup>

A third, more moderate position is attributed to some Shāfi'īs and to Ḥanafīs in general. They espoused the view that the application of *maṣlaḥah* is valid even though it is not directly supported by textual evidence, provided it is similar to those *maṣlaḥahs* (pl. ) which are unanimously accepted or which are based upon the *maqāṣid* (intent) of the law.<sup>32</sup> This group holds that the *naṣṣ* must at all times be given preference, except in the case where:

a) the *maṣlaḥah* is rooted in such a dire urgency, not merely founded upon a need assumed by the jurist.

b) the urgency must be of a universal nature, it must not be peculiar to a certain strata on the community.<sup>33</sup> Al-Ghazzālī and Āmidī are among this group.<sup>34</sup>

The first notion of *maṣlaḥah* as described by Imām al-Ḥaramayn al-Juwaynī (438/1047) possess a remarkable resemblance with the older concept of *qiyās*. In fact it would be not be incorrect to assume that this was just another term for *qiyās*.

It is my contention, that although the first and the third positions are in theory the most widely accepted positions of the classical jurists, it did not mean that in practice the second position was totally discarded. The wisdom underlying this contradiction between theoretical rejection and practical application<sup>35</sup> will soon become clear in our analysis.

From the brief analysis of the concept of *maṣlaḥah* it is clear that the freedom which it enjoyed during its formative period<sup>36</sup> became gradually restricted by prudent jurists. On the one hand, *maṣlaḥah* was limited by theological determinism which defined it as a divine dictate.<sup>37</sup> On the other hand, it became restricted by a methodological determinism which was primarily designed to prevent arbitrariness in the form of unbridled personal discretion. This was achieved by subjecting *maṣlaḥah* to the strictures of *qiyās* and linking it to a more definite basis.

### **2. 3 Disparity between Theory and Application of Maṣlaḥah.**

The insistence upon basing or deducing laws from the stock of existing rulings of the *Sharīʿah*, to the exclusion of all other extra-legal<sup>38</sup> considerations has been viewed by some as a negative and unjustified restraint. The latter position was in particular oblivious of social need and change.<sup>39</sup>

What becomes very clear in the writings of the latter jurists<sup>40</sup> is that any attempt to admit the legitimacy of distilling<sup>41</sup> from the "bottom" (realm of reality) was contemptuous. The use of profane reality as a basis to realize the sacred was, at least in theory, absurd. Hence, any practical precedent in which the concept of *maṣlaḥah* was used is very seldom cited, thereby reducing the entire debate to the theoretical world of the scholars.

In his study of the doctrine of *maṣlaḥah* as an ethical concept during medieval Islam, Hourani observed that there existed two theories of value in medieval Islam.<sup>42</sup> The first theory of value he termed "objectivism" referred to that value which had real existence.<sup>43</sup> The second theory of value which he called "theistic subjectivism" referred to those values that were determined by the Will of God.<sup>44</sup> The theory of objectivism is based upon the existential reality of values, whereas the theory of "theistic subjectivism" was rooted in the realm of the ideal. The doctrine of *maṣlaḥah* tended towards "objectivism".

The question of how law is to be applied without being transformed from an eternal ideal into the world of experience (reality) is still largely an unresolved enigma fraught with ambiguities and contradictions between theory and practice. While the western jurist is accustomed to dealing

with law as an exclusively existential phenomenon, relegating the question of its relation to theology to a completely separate field of study, classical Muslim jurists tended to combine their attention to law and theology without drawing any clear distinction.<sup>45</sup> This state of affairs promoted a degree of flexibility and enabled the jurist to oscillate between the ideal and the real in practice.<sup>46</sup> However, no such flexibility was feasible in theory.<sup>47</sup> Hence, we find the conspicuous absence of the citation of practical examples of cases which were considered illegal because they were based upon the concept of *maṣlaḥah*. The law books lack examples of the application of the doctrine of *maṣlaḥah* to the public domain simply because they were in breach of certain legal principles.

On the other hand, rulings existed which were in direct contradiction of the established legal principles. This is a clear example of how easy it may be to prescribe rigid principles to govern the application of the law without a corresponding effect in practice. It would seem that in theory, the jurist was obliged to adopt a rigid posture vis a vis the doctrine of *maṣlaḥah*,<sup>48</sup> but when faced with the practical need to apply it, he would be more flexible. This apparent dichotomy of the theoretical and the practical spheres, was not the result of juristic incompetence, but rather the genius of juristic skills. The process of passing judgment is informed and influenced by many factors, legal and extra-legal. It is therefore imprudent, and indeed not possible, to delimit precisely what extra-legal factors must be considered, because each situation is unique. As the doctrine of *maṣlaḥah* is much too broad a category, its use as a legal basis poses tremendous problems for the legal theorists. On the one hand, *maṣlaḥah* is indisputably a vital ingredient in any sound ruling, and on the other hand, it is much too illusive a concept to accept a rigid legal



definition. Its application therefore becomes a matter of judicial skill based on experience rather than on theory.<sup>49</sup>

Ideally, the doctrine of *maṣlaḥah* implies that the overall welfare of the Community overshadows any particular legal consideration, especially of the individual. The general right or duty is more important than the particular one, not on a quantitative numerical basis (as if two rights were regarded as more important than one), but because of the universal character of the general right. However, in practice it is difficult if not impossible to avoid human estimation of social needs and demands in the application of *maṣlaḥah*. Here, absolute and conclusive principles can seldom, if ever, be applied unequivocally. The most that one can usually do is to make more or less an educated assessment of which course of action is more likely to produce the most desired results for that particular situation. Moreover, since no two real life situations can be completely identical, it is virtually impossible to prescribe absolute principles governing all possible situations. Each application of *maṣlaḥah* must therefore be treated on merit which implies a degree of subjective judgment.

It is precisely this consideration that compelled the jurists to restrict this utilitarian methodology to the non-devotional aspects of the law.<sup>50</sup> The devotional ( *‘ibādāt* ) aspects belong exclusively to a spiritual category in which revelation is a more explicit and adequate, eternal guide. The official policy in relation to *‘ibādah* is therefore one of *tawqīf* (restraint, abstinence); meaning restriction to what is specifically commanded by the texts. These are assumed to bear spiritual rather than material benefits, which are not rationally discernable.<sup>51</sup>

The doctrine of *maṣlaḥah* is therefore easier defined in terms of the parameters in which it ought to operate ideally, because the parameters

are easier recognized in theory than in practice. On the other hand, it is virtually impossible to implement the doctrine of *maṣlaḥah* by rigidly sticking to the parameters defined by the jurists, because each individual case which warrants the application of *maṣlaḥah* is to some extent unique. Therefore, the reality or the urgency of the needs must dictate the parameters rather than the legal theory.

This is supposed by the doctrine of necessity (*idtirār, ḍarūrah*) which made allowances for the law to be set aside in the event of extreme cases. Although this doctrine enjoyed currency among the jurists, it was not directly associated with the concept of *maṣlaḥah*, pertaining as it does to matters of extreme necessity, involving decisions of life and death.

The Qur'ānic concession for "necessity" are indeed numerous and pertain to matters of *ʿibādāt* and *muʿāmalāt* (non devotional matters). For example, the Qur'ān permits the eating of forbidden food in circumstances of extreme hunger (2:173). While on journey, it is lawful to postpone the observance of the fast and to reduce the prescribed prayer (2:184). This is a concession based entirely upon specific exigencies.<sup>52</sup>

Al-Ghazzālī (d. 505/1111) devoted a great deal of his effort on the elaboration of the doctrine of *maṣlaḥah*. I have chosen al-Ghazzālī's approach and analysis of *maṣlaḥah*<sup>53</sup> as a classical example of the orthodox notion of *maṣlaḥah*.

#### 2. 4 Al-Ghazzālī and the Doctrine of Maṣlaḥah.

Al-Ghazzālī's view is that whatever promotes the preservation of the

*maqāṣid* of the *dīn*<sup>54</sup> is termed *maṣlaḥah* and whatever fails to preserve them is termed *mafsadah* (defilement) and its eradication is *maṣlaḥah*.<sup>55</sup> He divides *maṣlaḥah* into three broad categories.

- 1.) *Maṣlaḥah* that is based upon textual evidence (*naṣṣ*).
  - 2.) *Maṣlaḥah* denied by, or which contradicts the *naṣṣ*.
  - 3.) The third type is neither supported by, nor denied by textual evidence.
- The first category is acceptable and forms the basis of *qiyās*.<sup>56</sup> The second type of *maṣlaḥah* is rejected. The element of *maṣlaḥah* embraced by the third category, which is termed *maṣlaḥah al-mursalah*, is further analyzed in terms of its strength (*qūwwah*).<sup>57</sup>

*Maṣlaḥah*, in terms of strength, is graded into *ḍarūrāt* (necessary, indispensable), *ḥājāt* (need), and *taḥsīnāt* (refinement). The preservation of the *maqāṣid* ("five objectives") is covered in the grade of *ḍarūrāt*. The second grade consists of those *maṣlaḥahs* which are not essential per se but are important for the promotion of general welfare.<sup>58</sup> He cites the example of the need to appoint a trustee to administer the affairs of a minor. Satisfying such a need promotes general welfare in the community. The third grade of *maṣlaḥahs* are designed to add refinement to conduct and method.<sup>59</sup>

Al-Ghazzālī treated the doctrine of *maṣlaḥah al-mursalah* with circumspection. He subjected it to strict scrutiny in terms of textual evidence. Secondly, he gave preference to *qiyās* and refused to recognize it (*maṣlaḥah al-mursalah*) as an independent principle of legal reasoning.

From a theological point of view, al-Ghazzālī found it problematic to accept *maṣlaḥah al-mursalah* as a concept of human utility, independent of God's determination. In order to decide that something is *maṣlaḥah*, even to say that God's commands are based on *maṣlaḥah*, implies the acceptance of some external criterion.<sup>60</sup> Al-Ghazzālī's attempt to

theologize the concept of *maṣlaḥah* was taken to its logical conclusion by al-Rāzī ( 545-606/ 1148-1210)<sup>61</sup> It would seem that Rāzī developed this objection and gave it a specific theological bias by arguing that to attribute the consideration of *maṣlaḥah* in terms of human utility to God's commands, is to attribute causality to His acts. This position was theologically untenable.<sup>62</sup>

#### **2. 4. 1 Al-Ghazzālī and the Application of Maṣlaḥah.**

Al-Ghazzālī cites an example of the case in which the unbelievers shield themselves with a group of Muslim captives. If the Muslims hold back from them they will attack, overwhelm the territory of Islam and kill all the Muslims. If, however, the Muslims strike at their (human) shield, they will kill innocent Muslims who have committed no wrong, and there is no allowance in the *Sharī'ah* for such action. Otherwise the unbelievers would gain the advantage over all the Muslims and annihilate them, and then kill the prisoners as well. It may rightly be said that the captives will be killed in either case. Faced with such a situation, preserving the greater body of Muslims is closer to the intent (*maqāṣid*) of the Law. For we know that the Law intends stopping it altogether if possible. If we cannot stop it altogether, we can at least minimize it. This would be a case of resorting to a *maṣlaḥah* known as necessity, since we know it to be an intent of the Law not by any particular indication or specific source, but by indications free of any restrictive definition.

But securing the intent by this means, namely by killing an innocent person or persons, is unusual (*gharīb*) and finds support in no particular

source. Thus, it is an example of a *maṣlaḥah* not determined by analogy from a particular source, but is inspired by three conditions:

(1) it is a matter of vital necessity (*darūrah*). (2) it is a case of clear cut certainty (*qatʿiyyah*)<sup>63</sup> (3) its importance is universal.<sup>64</sup>

Whether al-Ghazzālī's claim is justified is another matter. It might easily be argued that his conception of what constitutes a vital necessity, or what is certain and universal is inevitably subjective.<sup>65</sup> Al-Ghazzālī cites another example to emphasize his point; in the case of a floundering ship, the lives of a limited number of persons would be at stake and therefore it would not be lawful to throw one person overboard to save the rest. Nor may a group who are starving draw lots and practice cannibalism on one of their number, because the *maṣlaḥah* would not be a universal one.<sup>66</sup>

Al-Ghazzālī draws a clear distinction between *maṣlaḥah* based upon the weight of numbers and the *maṣlaḥah* based upon the principle of universality. For an unlimited and universal number there is a different and stronger case than for simple preference of the greater number. In the case where the entire Muslim populace is facing imminent annihilation, it must be acknowledged that the shedding of forbidden and innocent blood must be weighted against the fact that in abstaining therefrom, an unlimited amount of innocent blood will be shed. We know that the Law gives preference to the universal over the particular, and therefore, preserving the people of Islam from the onslaught of the unbelievers is more important in the intent of the Law than preserving the blood of a few individuals. This is clearly indicated by the intent of the Law, and what is clearly indicated needs no support from a source.<sup>67</sup>

This last sentence is crucial to the debate. The principle of preference which al-Ghazzālī has appropriated, as he admits, is not based directly

on textual evidence as to justify *qiyās*, yet he maintains that it is undeniably present in the clear *intent* of the law. He continues:

Every *maṣlaḥah* that does not consist of implementing the understood Intent of the Qur'ān, *Sunnah*, and *Ijmā'*, is therefore foreign and inappropriate to the operations of the Law. It is therefore void and rejected, and whoever has recourse to it is arrogating the power of legislation, just as whoever uses *Istihṣān*<sup>68</sup> is legislating. Every valid *maṣlaḥah* is based on implementing the Intent of the Law, which must be determined by the Qur'ān, *Sunnah*, and *Ijmā'* and must not fall outside the scope of these sources. But it is not called *qiyās* but rather *maṣlaḥah mursalah*, because *qiyās* is a well-defined source in itself, while we know that the Law intends application of the *maṣlaḥah* not by one single indication, but by unlimited indications in the Qur'ān, *Sunnah*, and the context of circumstances; and because of this diversity of indications, it is called *maṣlaḥah mursalah*. As long as *maṣlaḥah* is interpreted to mean conservatism of the intent of the Law, then there is no room for argument in following it; rather, it should be accepted as a basis for judgement without dispute. Insofar as we have acknowledged disagreement, that has been the cases of two opposing *maṣlaḥahs* and intents, in which case preference must be given to the stronger.<sup>69</sup>

Thus it is clear that al-Ghazzālī insists that the absence of any direct specific textual evidence does not imply the absence of any textual backing at all, because to him the intent of the text is in certain circumstances equal to the text.

Some scholars will maintain that there remain certain deficiencies in the example quoted. Firstly, it would have been much more useful for

al-Ghazzālī to have analyzed an example of an existing ruling in which the concept of *maṣlaḥah* was applied. The example quoted is one of extreme rarity, the possibility of its occurrence is so remote as to consign it to the large stock of useful fiction. The example implies that the unbelievers' act of shielding behind the Muslim captives will undermine the entire Muslims' defence to an extent that they are exposed to annihilation. Although it may be conceded that, at most, it will inhibit the Muslim's striking ability, but to imply that it will impair their defenses, is an undue exaggeration. The idea of the unbelievers using a human shield to annihilate the entire Muslim population seems devoid of strict practical significance thereby allowing al-Ghazzālī (in his example) to translate the ideal into "practical reality" with the flexibility needed to suit his legal theory.

In other words, the example was created to suit his conception of *maṣlaḥah*. It would seem that there is a major advantage in constructing hypothetical examples. They could be constructed by the jurist to suit his legal theory, and overlook the real life situation. Compatibility between the hypothetical example and the jurists theory is simple, as is seen in al-Ghazzālī's example.

Problems often develop when attempts are made to legally justify real life examples.<sup>70</sup> It is one thing to cite an example of a ruling that was passed on the basis of an extra-legal principle, but quite another to delineate *all* the factors that influenced that ruling, especially if that information was never recorded by the ruling jurist.<sup>71</sup> This inevitably leads to the act of "attributing" motives to the ruling jurist.<sup>72</sup>

Be this as it may, al-Ghazzālī's example is still invaluable because it serves to underscore the theory that legitimate social needs were taken

into account in classical legal theory. This point is clearly seen in the works of Ibn Nujaym, the famous Ḥanafī jurist.

### 3. Social Exigencies as Extra-Legal Propositions.

In his famous work, *al-Ashbāh wa al-Naẓā'ir*, Ibn Nujaym (d.970/1563) extrapolated the main principles (*kullīyyāt*) of Islamic law based upon the Ḥanafī school, some of which deal exclusively with social conditions and needs.<sup>73</sup> Under the head "difficulty warrants relief"<sup>74</sup> he goes to great lengths to analyze seven factors; (1) travelling (*safar*), (2) illness (*marḍ*), (3) coercive force (*ikrāh*), (4) forgetfulness (*nisyān*), (5) ignorance (*jahl*), (6) universal affliction (*ʿumūm al-balwah*), and (7) deficiency (*naqs*) that warrant leniency (*takhfīf*).<sup>75</sup> The philosophy that underpins the discussion of these seven factors is clearly one of leniency, tolerance, and indulgence. Hence, the law is structured in such a manner as to incorporate provisions for such social phenomena.<sup>76</sup> What comes clearly across in his discussion is that, with the exclusion of the first, the evaluation of the remaining six factors cannot escape a degree of subjectivism. Hence, he avoids the arduous task of providing a clear definition to all these factors, settling for the enunciation of numerous examples of how the law was applied to such social phenomena. His other principles are that "harm is to be eliminated"<sup>77</sup> and "prevailing norms (*ʿādah*) are (legally) admissible".<sup>78</sup>

Ibn ʿAbidīn draws heavily on Ibn Nujaym<sup>79</sup> in his analysis of the concept of *ʿurf*, making no distinction between *ʿurf* and *ʿādah* (habit).<sup>80</sup>



### 3.1 ‘Urf or the Prevailing Norms.

As a noun from the verb *‘arafa* "to know", it meant what is known. That which is known and acceptable to a community is known as *‘urf*. The term gradually acquired a social value when the "known" becomes the familiar, the customary, the good, as distinguished from the unknown and strange (*gharīb*). It is in this sense that the terms *‘urf* and *ma ‘rūf* are understood in the Qur’ān.<sup>81</sup>

According to the orthodox jurists<sup>82</sup> one cannot arrive at what is good or what is evil except through divine revelation.<sup>83</sup> Human reason and *‘urf* cannot be relied upon to differentiate between good and evil.<sup>84</sup> Therefore, they contend, when God ordered that good should be done and that evil should be shunned, He could not have meant by *‘urf* and *ma ‘rūf* the good which reason or custom decrees to be such, but rather what He commands.<sup>85</sup> On the other hand, there existed the legal maxim "whatever the Muslims find good, is good in the sight of God". This maxim was attributed to the companion, Ibn Mas‘ūd, and not the Prophet. The term "Muslim" in this context was conceived by some of orthodoxy to be the *mujtahid* and not the ordinary Muslim.<sup>86</sup>

Tension between legitimate social needs, as portrayed by the prevailing social norms (*‘urf*), and the duty to control and regulate those norms in the light of the *Sharī‘ah*, has always constituted a major problem for the legal theorist who pursues a balance between the two.

Ibn ‘Abidīn (d. 1256/1836) dealt extensively with the principle of *‘urf* in

his *Risālah* (tract) entitled *Nashr al-‘Urf fī Binā Ba ‘d al-Aḥkām ‘ala al-‘Urf*. He distinguishes between two types of ‘urf, the general (‘ām) and the special (*khāṣṣ*).<sup>87</sup> If the general ‘urf entirely contradicts the *naṣṣ*, it cannot be followed; but if it runs counter to certain aspects of the *naṣṣ*, the ‘urf acts as a limiting factor on the *naṣṣ*. If it is a special ‘urf, it may not be followed.<sup>88</sup>

‘Urf, argues Ibn ‘Abidīn, had a profound effect upon the rulings of the former jurists. Customs which prevailed during the time of the former jurists were always taken into account when a *fatwah* (judicial decree) was passed.<sup>89</sup> He maintains that general ‘urf should supersede a general rule and a special ‘urf should supersede a special rule. Had the former jurists lived in later times they would have based their rulings on the new ‘urf.<sup>90</sup>

To illustrate this point, Ibn ‘Abidīn cites numerous<sup>91</sup> practical examples. He deals with the problem of ‘urf on two levels. On the first level, he analyzes the ‘urf that opposes the *naṣṣ* and on the second level, he scrutinizes the ‘urf that contradicts previous jurists’ rulings (precedent).<sup>92</sup>

### 3.3 ‘Urf vs Naṣṣ.

According to the prophetic injunction, gold must be sold by weight (*wazn*) and not by measurement (*kayl*).<sup>93</sup> Despite this direct prophetic injunction, Imām Abū Yūsuf (d. 798) ruled that gold could be sold by measurement (*kayl*) because it was the established practice (‘urf) of the merchants of his time. After citing this example, Ibn ‘Abidīn comes out in defence of Abū Yūsuf. He rejects any attempt at discrediting Abū Yūsuf for ruling in favour of a commercial practice, which appears to

run against the grain of a direct prophetic injunction. What this ruling of Abū Yūsuf implied, explains Ibn ‘Abidīn, was that the prophetic injunction (*naṣṣ*) was in line with the prevailing practice at that time.

[Therefore] the *naṣṣ* during that time was in conformity with the norm (*‘ādah*).<sup>94</sup> Had the prevailing norm been different during that time, [at the time of the prophetic injunction] the *naṣṣ* would have conformed to it.<sup>95</sup>

This type of legal argument, (which was adduced in order to substantiate Abū Yūsuf’s ruling) if accepted as valid, must constitute grave problems for legal theory. This argument raises more questions than it purports to answer. What criteria is to be used in evaluating the ‘*urf*? One could use this argument to justify virtually any prevailing norm by simply asserting that, had the law been revealed in this day and age, it would have conformed with the prevailing norm. Ibn ‘Abidīn’s answer implies that *naṣṣ* is regulated by ‘*urf* rather than ‘*urf* being regulated by *naṣṣ*. Under the circumstance, Abū Yūsuf’s ruling is not nearly as controversial as the argument forwarded to substantiate it.<sup>96</sup>

Although Ibn ‘Abidīn succeeds in explaining the important ramifications of Abū Yūsuf’s vital ruling, he fails to produce an acceptable argument (in terms of legal theory) to substantiate it.<sup>97</sup> Had Abū Yūsuf not sanctioned the selling of gold by *kayl* (measurement, pieces), it would have meant that the prevailing commercial practice of paying for merchandise in the form of gold pieces (dirhams) would not be permitted, unless each gold piece is precisely weighed. Due to the disparity of weight found in the many types of gold coins minted by the numerous Sultans,<sup>98</sup> it would have resulted in commercial chaos to stipulate that each different piece of gold (coin) should be valued in terms of its

precise weight.<sup>99</sup> In other words, the sale of goods should be transacted in terms of the weight of the gold rather than in terms of the number of gold coins. Obviously, this stipulation has inherent difficulties which were acknowledged by Abū Yūsuf, who ruled against it.

This is a striking example of the disparity between legal theory and practice. In terms of orthodox legal theory, there is no conceivable way in which to justify a ruling that contradicts a conspicuous injunction based on *naṣṣ*. Yet, in practice it continued unabated.

### 3. 4‘Urf vs Precedent.

If the ‘urf changes with time and a new ‘urf prevails, is it permissible for the instant *muftī* (jurist) to rule in favour of the new ‘urf and in so doing, contradicts the verdicts recorded in the books of the madhhab?<sup>100</sup> This *Risālah*<sup>101</sup> has been based upon this proposition.<sup>102</sup> You should be aware [of the fact] that the counter rulings given by the subsequent jurists (*muta’akhirūn*) in opposition to the recorded verdicts of the madhhab, were for no other reason than the change of times and ‘urf.<sup>103</sup>

This quotation clearly spells out the view of Ibn ‘Abidīn with regard to the importance of ‘urf as an extra-legal proposition. Now this is a very significant statement from which much can be learnt. First, the prevailing norms (‘urf) of a community must at all times be considered as a valid extra-legal proposition upon which certain rulings could be based. Second, since mores and standards of a community do not remain immutable, they are constantly subjected to change. This change in the ‘urf must in turn preempt the revision of the previous ruling based upon

an *ʿurf* that no longer prevails. Third, the context out of which a particular ruling emerged must always be scrutinized to ascertain the degree of influence exerted by *ʿurf* upon that ruling.<sup>104</sup>

It is interesting to note that unlike many other legal theorists, who usually construct hypothetical situations, Ibn ʿAbidīn (d. 1256/ 1836) chooses real life examples.

The following are among the examples cited by him: the permissibility of hiring the service of someone to teach the Qurʾān; the legality of a sale with a right of redemption (*bayʿ bi al-wafāʾ*);<sup>105</sup> and the judges acceptance of circumstantial evidence.<sup>106</sup> Previous jurists ruled against such practices. The Qurʾān was to be taught free of charge; a sale with a condition negating its finality was not allowed, nor could a judge accept circumstantial evidence, because evidence was only considered when given by direct oral testimony (witnesses), by admission, or by the defendant's refusal to take an oath denying the claim.<sup>107</sup> As seen from these examples, there could be no question about the vital role of *ʿurf* in the judicial process. In spite of this, its scope must necessarily be restricted to obviate abuse.

Once again, the legal theorists were confronted with a problem. They were compelled to seek a balance. On the one hand, there existed a genuine need to insulate the use of *ʿurf* (as a pretext to sanction anything) from abuse and on the other hand, there existed the real danger that too many strictures may result in the concept losing its viability and become useless. Ibn ʿAbidīn's tract could be seen as a bold and gallant attempt to strike that crucial balance. He neither stifles it by imposing unnecessary stricture upon it, nor does he advocate that degree of liberty which results in abuse. He achieves this by, firstly disparaging the notion that the jurist should at all times be bound to the letter of the recorded rulings, and secondly, he entrusts the application of *ʿurf* to the discretion and the experience of the jurist.

All the conspicuous arguments and examples . . . must emphasize the fact that a *mufti* must not remain confined to what is recorded in the books of the *madhhab* without any due consideration of the times and the [social set up] of the community. Otherwise a great injustice would occur which will result in more harm than good.<sup>108</sup>

Ibn ‘Abidīn believes that even if a jurist (*mufti*) studies all the legal propositions recorded in the law books, he is not qualified to pronounce legal rulings until such time that he is fully acquainted with all the vital extra-legal propositions, such as the prevailing ‘*urf* and the social needs of the community.<sup>109</sup>

Other jurists have failed to strike the perfect balance and opted for one of the two extremes. Some opted for placing ‘*urf* under severe restrictions,<sup>110</sup> while others such as al-Qarāfī (d. 1285) elevated it to a definite source of law.<sup>111</sup>

In this chapter the distinction between extending the law and adapting the law was illustrated. The extension of the law was brought about by the employment of *qiyās*, whereas adapting the law meant taking cognisance of extra-legal propositions such as *maṣlaḥah* and ‘*urf*. This chapter also serves to emphasize the vital role of extra-legal propositions and their crucial function in the judicial process. A ruling that fails to take proper account of its social milieu, is therefore devoid of judicial insight and potentially harmful.

## NOTES FOR CHAPTER II.

1. L.Gilkey, *Catholicism Confronts Modernity, A Protestant View*, p.47.
2. It is my contention that any rules and norms designed to order the social and religious life of a community is in some way affected by the dynamic influence which a social setting (environment) is bound to have on the application of those rules and norms.
3. M.H. Kerr, *Islamic Reform*, pp.1-13.
4. Prof. J.Cumpsty, "Religion as Belonging", (unpublished) p.5.
5. With the exception of the *Ḥadīth* group (*Ahlī al-Ḥadīth*) who expressed the same fear of arbitrariness for the method of *qiyās* as it had done for *ra'y* (personal opinion) and the *Zāhirīs* (literalists) who refused to accept anything beyond the literal provisions of the text *qiyās* received official recognition.
6. See the section on *masālik al-ʿillah*. (p. 69 below)
7. K.Mas ʿūd, *Islamic Legal Philosophy* , p.167.
8. *Ibid.*, p.166.
9. M.H. Kerr, *Islamic Reform*, p.66.
10. In al-Ghazzālī's example cited above, even though no textual evidence was adduced, in fact, it appeared to be in direct contradiction of the law which prohibits the taking of innocent life. However, the clear intent (not merely the text) of the law are the guiding factors when the law is to be adapted.
11. Other important concepts such as, *qiyās*, *munāsib*, *istiḥsān*, *istishāb*, *ʿurf*, *ʿumūm al-balwah*, etc. were also developed as a direct result of the phenomenon of changing environments.
12. Many jurists such as al-Ghazzālī did not accord *maṣlaḥah* the status of an independent legal principle.
13. K.Mas ʿūd, *Islamic Legal Philosophy*, p.150.
14. A. Khalāf, *ʿIlm al-Uṣūl al-Fiqh* (Kuwait, 1983), p.64

15. The benefit and welfare (*maṣlaḥah*) implied in the revealed law are intended to protect the adherent's religion (*dīn*), life (*nafs*), rational faculties (*ʿaql*), lineage (*nasl*), and wealth (*amwāl*). The protection of these "five objectives" is conceived to be the *maqāṣid* (intentions) of the *Sharīʿah*. Saʿīd Ramaḍān Būtī, *Dawābiṭ al-Maṣlaḥah*, p.23.
16. *Ibid.*, p.330 also A. Khalāf, *ʿIlm al-Uṣūl al-Fiqh*, p.84.
17. *Ibid.*, p.84. For the purpose of this study, we will confine ourself to the concept of *maṣlaḥah al-mursalah*. My use of the term *maṣlaḥah* will therefore mean *maṣlaḥah al-mursalah*.
18. The Prophet appointed Muʿādh bin Jabal governor of Yemen. Before Muʿādh left, he was asked by the Prophet what his basis would be in the event of him being confronted by a problem. Muʿādh replied that he would pass judgment in the light of the Qurʾān. The Prophet asked: "assuming that you do not find it [solution] in the Qurʾān, on what basis would you then judge? Muʿādh replied that he would then revert to the *Sunnah* of the Prophet. The Prophet responded: "assuming that you do not find it [solution] in the Qurʾān or in the *Sunnah*, on what basis would you then judge? Muʿādh replied that he would then use his individual discretion. The Prophet was pleased with this answer. I.Doi, *Sharīʿah the Islamic Law* (London, 1984), p.71. For a complete analysis on the concept of *ijtihād* as well as its historical development, see, W.Zuhaylī *Uṣūl al-Fiqh al-Islāmī*, pp.477-516.
19. *Ijtiḥād* became more and more strictly controlled. Medieval jurists devoted a great deal of effort and ingenuity on developing ways of insulating *ijtiḥād* against abuse by prescribing necessary conditions (*shurūṭ*). See *Ibid.*, pp.476-494.
20. Depending upon the degree of potential abuse to which a concept could be exposed, to that extent do we find restrictions governing the application of that concept.
21. K.Masʿūd, *Islamic Legal Philosophy*, p.150.
22. *Ibid.*, p.151.
23. Shāfiʿī's famous maxim : "*man istaḥsana fa qad sharaʿa*"; (He who employs *istiḥsān*, legislates). W.Zuhaylī *Uṣūl*, p.282.
24. W.Zuhaylī *Uṣūl*, p.351.



25. *Ibid.*, p.352.
26. *Ibid.*, p.294.
27. Ḥafiz Mandharī, *Mukhtaṣar Ṣaḥīḥ Muslim* (Kuwait,1969), Vol.1, p.141.
28. This is a *mutawātir* (widespread and universally reported) *ḥadīth* recorded in all the six "authentic" books.
29. W.Zuhaylī *Uṣūl*, p.355.
30. For a detailed exposition on al-Ṭūfī's view refer to: Sa'īd Ramaḍān Būṭī, *Ḍawābiṭ al-Maṣlaḥah*, pp.201-215.
31. W.Zuhaylī *Uṣūl*, pp.357-358 for an exposition on Imām Mālik's view with regard to issue of giving preference to *maṣlaḥah* over *naṣṣ*. Sa'īd Ramaḍān Būṭī *Ḍawābiṭ al-Maṣlaḥah*, pp.188-193. K.Mas'ūd, *Islamic Legal Philosophy*, p.151.
32. K.Mas'ūd, *Islamic Legal Philosophy*, p.151.
33. W.Zuhaylī, *Uṣūl*, p.356.  
*Refer to al-Ghazzālī's example of the Muslims being held to ransom.*
34. *Ibid.*, p.356.
35. The contradiction is that in theory a jurist may subscribe to the third position, but in practice he also employs the second position.
36. The latitude which the application of the concept of *maṣlaḥah* enjoyed during the period of the early jurists like Abū Ḥanīfa, Abū Yūsuf, and Mālik became gradually restricted by subsequent jurists.
37. K.Mas'ūd, *Islamic Legal Philosophy*, p.160.
38. In the following chapter I have made a detailed analysis of the status of extra-legal propositions.
39. K.Mas'ūd, *Islamic Legal Philosophy*, p.151.
40. A typical example of this could be found in Ramaḍān Būṭī's elaborate work on *maṣlaḥah*. We find that he attempts to place severe strictures upon the application of *maṣlaḥah*. Sa'īd Ramaḍān

Būṭī *Ḍawābiṭ al-Maṣlaḥah*. pp.280-292.

41. By distillation I mean the process whereby contemporary social needs could be used as a vital extra-legal proposition when applying the law.
42. Hourani, "Two Theories of Value in Medieval Islam" in *Muslim World L*, (1960) pp. 269-278.
43. The Mu ḥtazīlah subscribed to the theory that value has real existence. K.Mas ḥūd, *Islamic Legal Philosophy*, p.178.
44. The Ash ḥarīs held to the theory that values are those that God willed. K.Mas ḥūd, *Islamic Legal Philosophy*, 1977), p.178.
45. M.H. Kerr, *Islamic Reform*, pp.23.
46. By practice I mean, when the jurist is called upon to pass judgment on some current social exigency, he is often obliged to take into account various extra-legal factors which invariably influence his ultimate ruling. In theory, however, he admits of no such vital considerations.
47. This disparity is clearly seen in the example of the ruling of Abū Yūsuf on the issue of selling gold by measurement (*kayl*). see p.48 above.
48. This was accomplished by placing severe restriction and qualifications upon the application of *maṣlaḥah*.
49. The issue of inherent leeways in the application of the law is discussed in the next chapter.
50. M.H. Kerr, *Islamic Reform*, pp.22.
51. *Ibid.*, pp.88-89.
52. Ibn Nujaym, *al-Ashbāḥ wa al-Naḥā'ir*, pp.75.
53. Al-Ghazzālī, *al-Mustaṣfā fī ḥilm al-Uṣūl*, Vol.1, pp.284-314
54. See note 13 for a description of the five *maqāṣid* (five objectives).
55. Al-Ghazzālī, *al-Mustaṣfā fī ḥilm al-Uṣūl*, Vol.1, pp.286-87. Although *munāṣabah* (suitability) and *maṣlaḥah* are not identical terms, Ghazzālī seems to analyze *munāṣib* in terms of effectiveness and

validity in the same way as he does with *maṣlaḥah*. He divides *munāsib* into four categories: the first category of *munāsib* is that which is supported by textual evidence. The second is that which is neither suitable nor supported by textual evidence. The third category is that *munāsib* that is supported by textual evidence but is not suitable to it. The fourth category is that *munāsib* that is not supported by textual evidence but is suitable to it.

The first category enjoys the unanimous sanction of all jurists and is termed *qiyās*. W.Zuhaylī *Uṣūl*, pp.317-18.

The second category which he terms *istiḥsān*, is rejected by him because it implies the making of law according to one's personal discretion. *Ibid.*, pp.317-18

56. Al-Ghazzālī, *al-Mustaṣfā fī ʿIlm al-Uṣūl*, Vol.1, pp.284. W.Zuhaylī *Uṣūl*, p.318.
57. *Ibid.*, p.290. The analysis in terms of *quwwah* will soon be applied to al-Ghazzālī's example quoted below.
58. Al-Ghazzālī, *al-Mustaṣfā* p.289.
59. *Ibid.*, p.290.
60. K.Mas ʿūd, *Islamic Legal Philosophy*, p.160.
61. Fakhr al-Dīn al-Rāzī was a renowned author, theologian, and philosopher. He was born in Ray. He was an arch opponent of the Muʿtazilah school. He devoted his entire life to study and writing. Most of his works deal with theology and philosophy. He also wrote on other subjects such as jurisprudence, language, ethics and medicine. He wrote the famous *Tafsīr al-Kabīr* (an elaborate commentary on the Qurʾān). He was an Ashʿarī theologian who defended traditional *Sunni* Islam against free Rationalism. Al-Rāzī, as al-Ghazzālī's Ashʿarī successor, completed al-Ghazzālī's work with greater emphasis on the rational element in Ashʿarī thought and ultimately achieved what could be termed the theologization of rational philosophy in Islam. He died in Herat in 606/1210. (*Encyclopedia of Religion*, s.v. "Al-Rāzī" by Effat Al-Sharqāwī.
62. The Ashʿarīs reject the notion of attributing causality to God's will. Harry Wolfson, *The Philosophy of Kalām* (London, 1976), p.518.
63. The issue under consideration must be a real life exigency, not a

hypothetical problem.

64. Al-Ghazzālī, *al-Mustaṣfā*, pp.295-297.
65. M.H. Kerr, *Islamic Reform*, p.96.
66. Al-Ghazzālī, *al-Mustaṣfā*, p.297.  
Maḥmasānī (*Falsafā*, p.254) cites similar decisions in British and American courts refusing to condone cannibalism to keep the group from starving (Regina v. Dudley and Stevens, L.R. 14 Q.B.D. 273; United States v. Holmes, 1 Wallace 1).
67. Al-Ghazzālī, *al-Mustaṣfā*, p.303.
68. Al-Ghazzālī, like al-Shāfiʿī also condemned the concept of *istiḥsān* which he regarded as man-made law. *Istiḥsān* in al-Ghazzālī's definition was the act of giving preference to an extra-legal proposition in contradiction to an existing legal principle (*naṣṣ*). W.Zuhaylī *Uṣūl*, p.321.
69. Al-Ghazzālī, *al-Mustaṣfā*, pp. 303-304. Translation: M.H. Kerr, *Islamic Reform*, pp.96-97. I have made some changes to the translation.
70. Further on we will see how difficult it becomes for Ibn ʿAbidīn to justify Abū Yūsuf's ruling on gold.
71. I have dealt with the issue of contextuality towards the end of the next chapter.
72. In the case of Ibn ʿAbidīn, we see him "attributing" reasons for Abū Yūsuf's ruling on gold.
73. Ibn Nujaym's legal principles four, five and six of Islamic law deal with social needs. Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, pp.76-104.
74. "Difficulty warrants relief" is the fourth principle. Ibn Nujaym, *al-Ashbāh*, pp.75-84.
75. *Ibid.*, pp.75-76
76. *Ibid.*, pp.75-84.
77. "Harm is to be eliminated" is the fifth principle. *Ibid.*, pp.85-92.
78. "*Al-ʿādah muḥakkamah*", is the sixth principle. *Ibid.*, pp.97-104.

79. Ibn ʿĀbidīn, *Nashr al-ʿUrf fī Binā Ba ʿd al-Aḥkām ʿala al-ʿUrf* (Beirut, n.d.) pp.114-147.
80. *Ibid.*, p.114
81. Farhat Ziadeh, "ʿUrf and Islamic Law" in *The World of Islam* (ed) B.Winder (London, 1959), p.60
82. The Ash ʿarī jurists refuse to accept the role of reason in determining the law.
83. See above under the head: "Law and Epistemology". see p.9 above.
84. Abū-Sanah, *al-ʿUrf wal-ʿādah fī Ra'y al-Fuqahā'* (Cairo: 1949), p.30.
85. Farhat Ziadeh, "ʿUrf and Islamic Law" in *The World of Islam* (ed) B.Winder (London, 1959), p.62  
From the interpretation of *ma'rūf* one is able to clearly see how the orthodox epistemology influenced the formulation of legal theory.
86. Abū-Sanah, *al-ʿUrf wal-ʿādah fī Ra'y al-Fuqahā'*, p.24.  
To interpret "Muslim" to mean *mujtahid* is obviously slanted to entrench the concept of *taqlīd*.
87. Ibn ʿĀbidīn, *Nashr al-ʿUrf*, p.116.
88. *Ibid.*, p.117.
89. *Ibid.*, p.133.
90. *Ibid.*, p.132.
91. In fact, the better part of his *Risālah* is spent on analyzing examples of rulings passed on the basis of ʿurf. See pp.118-140
92. Ibn ʿĀbidīn, *Nashr*, p.117.
93. *Ibid.*, p.118. Here measurement would mean gold pieces in the form of coins.
94. Ibn ʿĀbidīn uses the term "ʿadah" (habitual practice) interchangeably with ʿurf. *Ibid.*, p.114.
95. *Ibid.*, p.118.

96. Ibn ʿĀbidīn's argument is also definitely untenable in terms of *kalām* (theology) because it directly attributes causality to the revealed law.
97. Ibn ʿĀbidīn, *Nashr al-ʿUrf* (Beirut, n.d.) pp.118-120.
98. For an idea of the many different types of dirhams of Kirman, see George Miles, "The History of Kirman", in *The World of Islam*, (ed) B. Winder, (London: Macmillan & Co. 1959), pp.86-88
99. Ibn ʿĀbidīn, *Nashr*, p.119.
100. *Ibid.*, p.128.
101. *Ibid.*, p.129.
102. *Ibid.*, p.128, Meaning that most certainly rulings do change with the change of times and circumstances.
103. *Ibid.*, p.128.
104. I have dealt with the issue of the "context" of a ruling towards the end of the following chapter.
105. Ibn ʿĀbidīn, *Nashr*, p.120.
106. *Ibid.*, p.128.
107. *Ibid.*, p.129.
108. *Ibid.*, p.131.
109. *Ibid.*, p.129 and p.133.
110. Sa ʿīd Ramaḍān Būṭī is among those who have placed severe restrictions on ʿurf. *Ḍawābiṭ al-Maṣlaḥah* (Beirut, 1977), pp.280-292.
111. Abū-Ṣanah, *al-ʿUrf wa al-ʿādah fī Ra'y al-Fuqahā'*, p.3.

## CHAPTER III

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## Chapter III

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**I**n terms of the application of the law, classical orthodoxy has a long and established tradition. In general, its judicial process has developed along very conservative lines.<sup>1</sup>

In this chapter I shall endeavour to discuss the effects of the orthodox views on the application of the law. Fundamental to the Islamic judicial system is the concept of *stare decisis* (precedent). In a legal system that functions on the basis of *stare decisis*, the accurate identification and precise delimitation of the *ratio legis* (*‘illah*) forms the very nucleus of judicial activity. I have therefore analyzed the concept of *‘illah* and demonstrated its inherent leeways.

### 1. Orthodoxy and the Application of the Law.

The attitude of the orthodox scholars towards law rested upon the fundamental proposition that revelation (*wahī*) prescribed rules and standards that were valid in all conditions and for all time and that divine revelation answered, directly or indirectly, every legal problem. In short the divine command is comprehensive and eternally valid.<sup>2</sup> The law is immutable and eternally valid but required comprehensive and exhaustive *ijtihād* to ascertain and establish the law in its minutest detail. This was accomplished by the past masters (*mujtahids*). Thus, a comprehensive body of law already exists, which means that a particular rule need



simply be identified and applied.<sup>3</sup>

According to this view no new *ijtihād* is necessary for the application of the existing law, and the doctrine of *stare decisis* (precedent, or keep to what has been decided previously, *taqlīd*) forms the foundation upon which the entire judicial process rests. Its corollary,<sup>4</sup> the concept of compulsory *taqlīd*, means that precedent is both binding and authentic. In terms of the orthodox view, Islamic law is conceived as a system of law whose content is more or less settled. This concept implies the stability of law. In spite of the vast political, social, economic and technological changes of the past fourteen hundred years, society nevertheless should be ordered by the same system of law. It is taken for granted that the present Islamic legal system is still the same as that original legal system of the Prophet of Islam. It is conceived as a single system of law, in which the present is deeply rooted in the past.

What I propose to do is to identify and demonstrate certain patterns of thought frequently found in the application of precedents which afford a basis for drawing a particular legal conclusion from existing authorities, while not compelling the instant jurist (*muftī*)<sup>5</sup> to that conclusion. We find that although the instant jurist may be apparently compelled to a conclusion based upon a previous verdict invoked by him, he is in fact not so compelled.

The primary reason for this delusion of being compelled to a particular conclusion, is that in most cases the instant jurist tends to take for granted that the ambit of a precedent, that is, the range of circumstances for which it is binding, is normally clear and known. Had the instant jurist entertained any doubt about the ambit of the precedent, he would not have felt "compelled" to a particular conclusion.

This chapter is primarily directed towards the contemporary orthodox jurist, who is confronted with the problem of having to apply the existing law to novel situations and finds himself torn between the binding nature of precedent and the need to adapt the law to achieve optimum benefit. I shall endeavour to demonstrate the leeways inherent in the doctrine of *stare decisis* which affords the instant jurist the scope needed to adapt the law while at the same time remaining faithful to the precedent.

## **2. Current Dilemma.**

Training in Islamic jurisprudence in all Islamic seminaries is essentially a training in cautiousness and conservatism. Its basis is the application of the judicial experience of the past to the judicial questions of the present. To meet new wants and needs is to search for new forms of old wants and needs. Orthodoxy tends to take for granted that the link is that of logical derivation. Certain fundamental principles have always existed in the original law. In order to decide the instant (new, current) case, these fundamental principles were there to be used as the basis for extending the law. In terms of the doctrine of precedent, a previously accepted ruling must have a direct bearing upon the instant case. The problem arises where earlier rulings are considered incorrect in the view of later jurists. It appears difficult or impossible for those dissenting to depart from such precedents.

## 2.1 Rulings Incorrectly Recorded.

The doctrine of *stare decisis* has been entrenched to a degree that we find the "binding" nature of the ruling is even extended to the recorded text of the ruling. This means that if a ruling was incorrectly recorded, the later jurist nevertheless felt bound to decide the instant case in the exact manner according to the dictates of the recorded text. In his celebrated work, *Rasm al-muftī*,<sup>6</sup> Ibn ʿAbidīn, clearly illustrates this point with amazing detail. Among the many examples he cited, is the issue of charging a fee for rendering religious services in the form of teaching the Qurʾān. The necessity to sanction this occupation was brought on by the need to retain the services of the teaching fraternity for their otherwise voluntary services, by financially compensating them. Without such compensation, the teachers would be without any viable source of income which would inevitable lead to a mass exodus from the teaching profession. Owing to some error in recording the above ruling, it purported to sanction not only the services rendered in the form of teaching the Qurʾān but also in the form of reading (*tilāwah*) it. Later jurists accepted this inaccurate recording of the ruling and used it as a major premiss to justify other actions, such as charging a fee for performing another's Haj, despite this being impermissible in terms of the original ruling.<sup>7</sup> Ibn ʿAbidīn goes on to quote several interesting examples of incorrectly recorded rulings which some respected jurists failed to detect and became instrumental in perpetuating the incorrect recording by incorporating it into their subsequent works.<sup>8</sup> He denounces this misrepresentation and terms certain excesses as "grotesque ignorance" (*al-jahl al-ʿazīm*).<sup>9</sup> He regards it is a display of "irrespon-

sibility" in matters pertaining to the law of the *Sharīʿah* and a clear manifestation of "pronouncing *fatāwa* without knowledge".<sup>10</sup> This clearly demonstrates the extent to which orthodoxy adheres to the doctrine of *stare decisis*.

### 3. Stare Decisis in Islamic Law.

On the one hand, flexibility appears not to be a characteristic of precedent, while appropriate application of the law requires a degree of flexibility. The binding force of precedent is therefore considered a fetter on the discretion of the instant jurist. Even in cases where no clear and direct precedent is available, the present jurist is obliged to consider previous "similar" decisions as part of the material on which his present decision must be based.<sup>11</sup> In cases where there exists a clear precedent, he is simply obliged to decide the case before him in the same way as that in which the previous case was decided, even if he gives a good reason for not doing so. In the last mentioned situation, the precedent is said to be binding or of coercive effect as contrasted with its merely persuasive effect as in the case of the former.

The philosophy of *stare decisis* stems from the basic principle of the administration of the law, that like cases should be decided alike. The strength of this tendency varies greatly. It may be little more than an inclination to do as others have done before, or it may be the outcome of a positive obligation to follow a previous decision in the absence of justification for departing from it. In the case of traditional Islamic legal philosophy, which views the previous classical rulings as founded upon divinely assisted and impeccable *ijtihād*, the binding authority of such

rulings becomes further entrenched. Precedent, according to the orthodox view, derives its binding authority and coercive nature from the notion that the previous classical rulings are the direct result of brilliant and unique efforts of *ijtihād* undertaken by the greatest and most distinguished jurists that walked the earth.<sup>12</sup> Since their *ijtihād* has seen no parallel, their verdicts and rulings have become institutionalized and binding upon all generations to come.

### **3.1 The Role of the Ratio Legis in stare decisis.**

In a legal system that functions on the basis of *stare decisis*, the accurate identification and precise delimitation of the *ratio legis* (*‘illah*) forms the very nucleus of judicial activity. This is so because the *‘illah* (*ratio legis*) is the part of the precedent that is binding. The *ratio legis* of an injunction should not be confused with the reasons that preempted the ruling. In the case of the Qur’ānic injunction prohibiting the consumption of wine (*khamar*), the *ratio legis* (*‘illah*) of the ruling will be intoxication, whereas the reasons for the injunction could be several, based upon various factors, be they social, economic or medical. The application of the law to novel situations proceeds with the task of judicial reasoning by analogy. The first stage of the exercise is the location or perception of relevant likeness and similarity between precedent and the instant case. The next stage is the most intricate and also the most vital stage of the exercise of judicial reasoning. It is the task of determining the purported *ratio legis* (*‘illah*) of the previous ruling. In other words, the task of discovering the "binding" part of the precedent. The third stage is the decision to apply that *ratio* to the instant case.

In terms of the doctrine of *stare decisis*, the judicial art of extrapolating the *ratio* of a previous ruling constitutes the very life of the judicial process of applying an existing law to contemporary life. The *ratio legis* inevitably becomes the "indispensible organic link between generations both of men and of emerging legal precepts".<sup>13</sup>

It would be this *ratio* which becomes the source of legitimation and sanction of all new precepts. Since the *‘illah* (*ratio*) is not always clear and obvious, the process of extrapolating it results in a proliferation of competing notions which becomes a valuable source of leeways.

### 3.2 Inherent Leeways in Precedent.

It is particularly obvious that in cases of disputed law,<sup>14</sup> any one ruling based upon a particular jurist's *ijtihād*<sup>15</sup> is not binding per se. Its "binding" applications is derived only when it is invoked under the doctrine of *stare decisis*, that is, when it is accepted and used as a major premise to judge later cases. The range of the choice of major premises is therefore an inherent source of leeways. This vital source of leeways is often overlooked because, when viewing previous rulings, the instant jurist is often labouring under two erroneous assumptions. He assumes that there is normally only *one ratio* and that one single legal solution is available on each matter.<sup>16</sup> He also assumes that this single *ratio* is discoverable and could be delimited by merely examining the text of the previous ruling. But this, as we will soon see, is not the case.

One of the primary reasons why a particular jurist like al-Shāfi‘ī differs with another jurist say, Abū Ḥanifa, is because the two jurists have

extrapolated different, and usually competing *rationes* from the text (*naṣṣ*). In fact, the books on Islamic jurisprudence are full of examples of competing rulings as a direct result of extrapolating different *rationes*.<sup>17</sup> The rulings on *ribā* (usuary) is a classical example of how extrapolating different competing *rationes* resulted in the difference of opinions of the various jurists.<sup>18</sup> The extrapolation of different *rationes* invariably leads to different conclusions. Conversely, the existence of different rulings based on the same source is an implicit indication of the existence of different *rationes*.<sup>19</sup>

### 3.3 The Development of the Concept of *ʿillah*

Modern historical and textual studies seems to indicate that although the concept of *ʿillah* has assumed a vital role in *qiyās*, the early jurists seldom used the term *qiyās* and never the term *ʿillah*. Imam Abū Ḥanifa neither used the term *qiyās* nor *ʿillah*.<sup>20</sup> Although al-Shāfiʿī uses the term *qiyās*, he uses the term "*ma ʿnā al-aṣlī*" (literally: original meaning) to connote *ʿillah*.<sup>21</sup> In all analogies, al-Shāfiʿī deems it necessary to consider the reason or the "*ma ʿnā*" for which God decreed the law. The concept of the *ma ʿnā* being used as a basis for analogy in order to extend the law to a novel situation, is similar to the concept of the *ʿillah*.<sup>22</sup> He argues that when the instant case shows similarity to several precedents in the texts, analogy must be applied to the precedent closest in resemblance and most appropriate.<sup>23</sup> Nevertheless, he openly admits that judicial inference must lead to difference of opinion.<sup>24</sup> A more systematic and comprehensive theory of *ʿillah* seems to have developed towards the end of the third century. According to research scholars, none of the works that focused on *ʿillah* seems to have survived from that

period.<sup>25</sup>

Al-Farābī's *Kitāb al-Qiyās al-Ṣaghīr* expounds the theory of ʿillah in a manner that appears to outstrip most if not all his predecessors.<sup>26</sup> Being a logician and philosopher, Farābī had no interest in the scriptural material which served as a basis of the jurist's reasoning. His work was restricted to the subject of syllogistics.<sup>27</sup> Abū Ḥusayn Al-Baṣrī's (d.436) *al-Mu'tamad fī Uṣūl al-Fiqh*, which came later, is by far a more elaborate exposition of ʿillah. It was to form the cornerstone of all future development of the concept of ʿillah.<sup>28</sup> However, Baṣrī's treatment of ʿillah is extremely interesting in that he justifies reasoning by ʿillah on the bases of public interest not directly specified in the texts.<sup>29</sup>

It was great medieval scholars like al-Ghazzālī that put the final touches to the concept of ʿillah. With his usual detailed and analytical fashion, this genius laid out what is still regarded as the most elaborate treatment of the concept of ʿillah. In his renowned work, *al-Mustaṣfa*, he thoroughly sketched not only the essence of ʿillah, but also the methods of identifying and extrapolating it.

### **3.4 Masālik-al-ʿillah (Extrapolation of the Ratio Legis).**

Legal theorists like al-Ghazzālī have laid down fourteen conditions (*shurūṭ*) governing the extrapolation of the *ratio legis* (ʿillah).<sup>30</sup>

In order to govern this crucial hermeneutical exercise and prevent whimsical fancies, arbitrariness and unbridled subjectivity to dominate it, legal theorists have also stipulated strict criteria to assess the legal



merit and worth of the *ratio legis*. Referred to as the *masālik al-ʿillah*, (methods of recognizing the *ratio*) theorists have spent a great deal of effort and ingenuity in describing these essential criteria in minute detail.<sup>31</sup> The five *masālik al-ʿillah* are:

### **3.4.1 Naṣṣ (Textual Evidence)**

On many occasions, the *ʿillah* accompanies the injunction, in which case it is relatively easy to recognize. In other words, the law and the *ratio* are revealed. For example, in the Qurʾān, Allah clearly declares the *ratio* for enjoining the performance of *ṣalah*: "I have established *ṣalah* for the purpose of my remembrance."<sup>32</sup> In this verse the *ratio* for *ṣalah* is clearly (textually) enunciated. Explaining the *ratio* for requesting permission for entry into another's premises, the Prophet SAW declared: [The act of] requesting permission was designed for [the protection of] the eye.<sup>33</sup> In other words, it was designed to protect the individual's privacy. The protection of the individual's privacy is therefore the clearly recorded *ratio* of the injunction. Once the *ratio legis* has been (textually) recorded, its conspicuous nature obviates the need for extrapolation, which usually minimizes the chances of *ikhtilāf* (differing opinions). The ambiguity of the *ʿillah* of an injunction is proportionate to the varying opinions emerging therefrom.<sup>34</sup>

### **3.4.2 Al-Ijmāʿ (Consensus).**

Once consensus has been reached on the *ratio* of a particular law, it

becomes relatively easy for the later jurist to apply it. For example, the establishment of trusteeship (*wilāyah*)<sup>35</sup> to administer the material and financial affairs of a minor, is directly based upon the law which prescribes *wilāyah* as a necessary condition for the marriage of a minor. The *ratio legis* of trusteeship (*wilāyah*) was established by consensus (*ijmāʿ*), and hence, all the affairs relating to a minor will be administered on the basis of *wilāyah*.<sup>36</sup> Hence, a jurist may apply the law of *wilāyah* to a major in the case of a mentally incompetent adult, by claiming that the said *ratio* (minor) implies mental incompetency. Since mental incompetence is an accepted feature of a minor, mental incompetency in the case of a major must be brought under the same jurisdiction of the law of *wilāyah*. Any analogy based upon the *ratio* established by *ijmāʿ* will be automatically authenticated without being itself subjected to the usual scrutiny.

### **3.4.3 Sabr wa al-Taqsīm. (Research and Elimination)**

This method is similar to the one used by Euclid and other Greek mathematicians. It is also used in philosophy. Some scholars (e.g. Shehaby) feel that it was based upon the Stoic schema whose first premise is an exclusive type of disjunctive ("Either-or") proposition consisting of three parts (either the first, the second or the third). When two of the parts are successively refuted, the confirmation of the third will necessarily be concluded.<sup>37</sup> When the *ratio legis* is neither textually enunciated nor confirmed by consensus, it becomes the intricate task of the jurist to establish it through the use of sound research and a process of elimination.<sup>38</sup> The hermeneutical skills of the jurist is thoroughly tested when he is required to extrapolate the *ratio[nes]* legis of the law.

It involves an assessment of all possible *‘illāhs*. The, by using the process of elimination, he chooses the most appropriate *ratio* or *rationes* of a case. This is done by isolating what he deems to be the material facts from the immaterial facts.<sup>39</sup> In the case of an Islamic marriage, the father is said to have *wilāyah al-ijbārī* over his daughter. This means that his consent is a condition for the validity of the marriage.<sup>40</sup> In order to establish the *ratio[nes] legis* of this rule, the jurist must consider and isolate the material facts upon which he is ultimately going to base his conclusion. After considering all dimensions of the rule, he is left with two potential *rationes*.

Vulnerability on the basis of age and virginity (*bikārah*) are in this case potential *rationes*. He could either accept both of these as being the *rationes* of the rule of *wilāyah al-ijbār*, or he could accept one of the two. On the basis of research and the process of elimination, usually further informed by some textual evidence, he must finally choose what he considers to be the *ratio[nes]*. This is a classical example of a rule which yields more than one potential *ratio*. Imām Shāfi‘ī regards vulnerability in terms of virginity as the *ratio legis* of the rule of *wilāyah al-ijbār*, whereas Imām Abū Ḥanīfa regards vulnerability in terms of age as the *ratio legis*.<sup>41</sup> Although both these jurists adduce textual evidence to support their respective positions, the mere fact they differed implies that the textual evidence available to them was not explicit enough to lead them to a single conclusion. What ultimately decided their respective positions is therefore not the text per se, but their interpretive reading of the texts based upon their individual research and other factors inherent in the complicated hermeneutical enterprise. The reasons forwarded by the jurist to substantiate and justify his position, is termed the *ratio decidendi* (reason for deciding) and should not be confused with the *ratio legis*.<sup>42</sup>

### 3.4.4 Munāsib. (Appropriate or Suitable)

When searching for the *ratio legis* of the law, the jurist must at all times be cognizant of the intent (*maqāṣid*) of the Law-giver (*Shāriʿ*). The intent of the law is conceived to be designed to generate spiritual as well as material benefit, and to dispel and eliminate harm.<sup>43</sup> The *ratio legis* of the law will invariably reflect this intent, although it will be differently nuanced according to the gravity of the situation. Hence, the *ratio legis* must at all times portray the *maqāṣid* (intent) of the law. Legal theorists have agreed that the *maqāṣid* of the law are five: (1) Protection of *dīn* (religion) as reflected in the concept of *jihad*. (2) The protection of life as seen in *qiṣāṣ*. (3) Safeguarding the *ʿaql* (intellect), by prohibiting intoxicants. (4) The protection of wealth by prescribing severe capital punishment for theft. (5) Protecting the *nasl* (lineage), by prohibiting fornication and adultery. When the term *munāsib* is used in relation to the *ratio*, it means that the *ratio* must display any one or more of the *maqāṣid*. In other words, if the jurist extrapolates a *ratio* from an existing law that fails to reflect the *maqāṣid* of the *dīn* in any one of its dimensions, it will not be regarded as *munāsib* and must therefore be discarded. It is quite obvious that the *maqāṣid* of the *dīn* is an extremely broad category and seldom serves as an effective guide. It does, however, play an important role in the application of the doctrine of *maṣlaḥah* (especially in the case of *ʿurf*). Sometimes the prevailing norms (*ʿurf*) are sanctioned despite the existence of clear textual evidence to the contrary. Such a sanction can only take place when the jurist is convinced that through the prevailing norm, the *maqāṣid* of the *dīn* will be better achieved.<sup>44</sup>

### 3.4.5 Tanqih al-Manat. (Examination 'illah's Properties)

This exercise entails the examination of the properties of the *'illah*, isolating from it those parts that are descriptive rather than effective.<sup>45</sup> An example of this is omitting ethnicity from the process of judicial reasoning in determining the penance of a Muslim Indian who intentionally broke his fast. The ethnicity of the Muslim has no effect (*athr*) on the ultimate ruling. Therefore, refinements which accrued to the doctrine of *'illah* were a clear manifestation of the growth of a systematic and well structured legal theory.

## 4. Orthodoxy and the ratio.

The orthodox *muftis* are willing to acknowledge that while the legal materials include areas of settled precepts, they also present guideposts to a host of alternative solutions which remain legally open beyond these areas. However, they tend to think that these areas of judicial choice are after all "exceptional". Therefore, they tend to convince themselves that they can get along well enough without agonizing too much about "exceptional" areas. The problem is, however, when there exist two or more competing legal propositions, yielding different results for the same facts. Or, even if there is ostensibly only one applicable legal proposition, this may exist in more than one version, each yielding, when treated as a major premise, different results for the instant facts. Hence, the jurist in all such cases cannot avoid the task of choosing which

proposition among the competing propositions or versions is to be chosen for the instant case. Post classical orthodoxy seems to assign the task of establishing the *ratio legis* of the law to the *mujtahids*<sup>46</sup> who possess the "monopoly" of discretion in this field. Implied in this view is that the instant jurist is not entitled to scrutinize the texts with the intention of extrapolating the *ratio legis* unless he is a "qualified" *mujtahid*. The question is whether one can be actively engaged in the judicial process *without* being involved in some way or another in judicial choicemaking (*tarjīh*).<sup>47</sup> Any judicial process that is devoid of choicemaking is both stagnant and anachronistic. Since it is accepted even by the most orthodox jurists that judicial choicemaking is an integral part of the judicial system, it must be accepted that any method that facilitates the burden of *tarjīh* should meet with equal approval. All that I am advocating is that the instant jurist should, when confronted with a novel situation, confine himself not only to the "accepted" (*muftā bihī*) rulings by assuming that there is only *one* answer to the current exigency.

In this chapter I endeavoured to demonstrate the inherent leeways found in the process of extrapolating the *‘illah*. I also attempted to show that it is not merely the binding nature of precedent that compels the instant jurist to decide in a particular manner, but it is rather his choice of major premises that compels a decision.

### NOTES FOR CHAPTER III.

1. By definition, the liberals (modernists) have as yet no established, clearly developed judicial tradition, one which could be subjected to scrutiny in order to ascertain how the "mutable view" affected the application of the law.
2. N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, p.102.
3. The orthodox view emphasises the necessity to make *taqlīd*.
4. It is common knowledge that orthodoxy has rigorously clung to the notion that:
  - 1.) The doors of *ijtihād* are closed since the fourth century.
  - 2.) The need for fresh *ijtihād* does not exist.
  - 3.) It is obligatory for both <sup>ʿ</sup>*ulamā* (learned) and the laity to strictly follow (*taqlīd*) a fixed *madhhab*.

Many volumes have been devoted to this ongoing debate, in which both the protagonists of the above notions and their opponents have endeavoured to justify their respective positions. For a detailed discussion on the above debate refer:  
 W.Zuhaylī *Uṣūl al-Fiqh al-Islāmī*, pp.477-610.  
 Shāh Walī Allāh, *ʿIqd al-Jīd fī Bayan Ahkām al-ijtihād wa al-taqlīd* (Karachi, 1956/60)

Muḥammad bin ʿAlī al-Shawkānī, *al-Qawl al-Mufīd fī ʿAdillāt al-ijtihād wa al-taqlīd* (Kuwait, 1980)

Muḥammad Masīḥullāh Khan, *Taqlīd wa ijtihād* (Jalalabad, 1979)
5. I have also used the English term "jurist" in the place of the traditional Arabic term "*muftī*". Hence the term "jurist" will refer to one who is traditionally called a *muftī*, one who is qualified to pronounce Islamic rulings.
6. Ibn ʿAbidīn, *Rasm al-muftī* (Beirut.n.d.), p.10-53
7. *Ibid.*, p.13.
8. *Ibid.*, p.13.  
 In some cases, as many as ten respected jurists failed to detect the incorrect recording.

9. *Ibid.*, p.15.
10. *Ibid.*, p.15.
11. *Ibid.*, p.18.
12. W.Zuhaylī, *Uṣūl al-Fiqh al-Islāmī*, p.527.
13. Stone, Julius, "The Ratio of the Ratio Decidendi" in *The Modern Law Review* (ed) Lord Chorley (London, 1959) Vol.22, p.599.
14. By the term "disputed law" I mean those laws which do not command a consensus.
15. The jurist's extrapolation of the *ʿillah* cannot be binding in cases that yield more than one *ʿillah*.
16. The problem of "one" *ratio* and "one" solution is the subject of intense debate among legal theorists. Al-Zuhaylī describes this debate as "*ikhtilāf al-tawīl*" and "*ikhtilāf al-kathīr*" (long and massive difference). W.Zuhaylī, *Uṣūl al-Fiqh al-Islāmī*, p.538. For a comprehensive study of this debate see, *ibid.*, pp.533-552. Also, Walī Allāh, *ʿIqd al-Jīd*, pp.12-13.
17. Shāh Walī Allāh described in detail the causes (*asbāb*) that contributed to the difference of opinions that among the *fuqahā*. See, *Hujjat Allāh al-Bālighah*, (Deoband: 1965), Vol.1 pp.339-347.
18. For a detailed discussion on the issue of *ribā* and the extrapolation of different *rationes* by different jurists, see; Aḥmad al-Kurdī, *Buhūth fī al-Fiqh al-Islāmī* (Damascus, 1976), pp.379-399.
19. Baṣrī, *al-Mu'tamad* (Damascus, 1964-1965), Vol.2 p.844, also see: W. Hallaq, "Logical Structure in Sunni Theory" in *Der Islam* (Berlin, 1987), p.57.
20. For a historical background of the concept of *qiyās* and *ʿillah*, see: Schacht, *Origins of Muhammadan Jurisprudence* (Oxford, 1979), pp.99-132.  
Nabil Shehaby's article "*ʿIllah and Qiyās in Early Islamic Legal Theory*", in *Journal of American Oriental Society*, 102.1 (1982), pp.27-46.  
Hallaq, "*The Development of logical Structure in Sunnī Legal Theory*".op.cit.,pp.43-67
21. Al-Shāfiʿī, *Risālah* (Bombay,n.d.), p.66.



22. *Ibid.*, p.66.
23. *Ibid.*, p.66.
24. *Ibid.*, p.66
25. W. Hallaq, "Development of the Logical Structure in Sunnī Legal Theory" in *Der Islam* (Berlin, 1987), p.48.
26. It must be noted that in the absence of other substantial works on *‘illah*, Farābī's work is considered to be among the pioneering efforts to produce a rational and detailed analysis of the concept of *qiyās* and *‘illah*.
27. Hallaq, op.cit., p.48.
28. Hallaq, op.cit., p.51.
29. Baṣrī, *al-Mu'tamad*, p.832.
30. Al-Zuhaylī, *Uṣūl al-Fiqh*, p.211.
31. *Ibid.*, p.220.
32. Qur'ān, (20:14)
33. Ṣaḥīḥ Bukhārī, trans. by M.Khan, (Lahore: 1979) Vol.8 pp.170-171.
34. For more details and examples of the various ways of recognizing textually recorded *rationes*, see Zuhaylī, *Uṣūl al-Fiqh*, pp.222-229. I have merely cited two simple examples, one from the Qur'ān and the other from the *Aḥādīth*, in order to illustrate the point. My concentration will be focused more on the last three methods, because they are not only too often overlooked, but they possess the most potential leeways needed to apply the law to novel situations.
35. *Wilāyah* in this sense refers to general trusteeship, incorporating both, inherent (*ijbārī*), as in the case of the father over his daughter, or appointed, as in the case of an executor over the affairs of a minor heir.
36. Al-Zuhaylī, *Uṣūl al-Fiqh*, p.230.
37. Nabil Shehaby, "‘Illah and Qiyās in Early Islamic Legal Theory" in *Journal of American Oriental Society* 1982, p.39.

38. Al-Zuhaylī, *Uṣūl al-Fiqh*, p.231.
39. *Ibid.*, p.231. also al-Ghazzālī, *al-Mustaṣṣā* Vol.II 295-296.
40. Ibn Humām, *Fatḥ al-Qadīr* (Egypt, 1970) Vol.3 p.260.
41. Al-Zuhaylī, *Uṣūl al-Fiqh*, p.232.
42. The distinction between the two terms, *ratio legis* and *ratio decidendi*, is vital to the understanding and application of the law. Too often the instant jurist confuses the *ratio legis* of the law with the *ratio decidendi* of a previous jurist. When applying a previous ruling to a novel situation, the instant jurist tends to regard the "assumed" reasons (*ratio decidendi*) of the previous ruling which are very often not stated by the ruling jurist, to be the *ratio legis*. The practice of the later jurists of speculating as to the precise *ratio[nes]* of the previous ruling has led many instant jurists to actually base their current ruling on these speculative reasons.
43. Al-Zuhaylī, *Uṣūl al-Fiqh*, p.236.
44. For an in depth discussion on the issue of *munāsib* and its relation to the doctrine of *maṣlaḥah* and other concepts of "public interest", see Zuhaylī, *Uṣūl al-Fiqh*, pp.236-252.
45. *Ibid.*, p.256.
46. The *mujtahid* is used to refer to a jurist who has reached an advanced level in both the understanding and application of the law. The extreme wing of orthodoxy have stipulated many conditions that a jurist must fulfil before he could exercise *ijtihād*. For a list and exposition of these *shurūṭ* (conditions), see: *Ibid.*, pp.486-494.
47. For this very reason there exists a large group of legal theorists, among them Abū Ḥasan al-Baṣrī (d.478/765) who stipulates that a jurist (*muftī*) must be a *mujtahid* before being allowed to rule on a matter. *Ibid.*, p.597.  
Shāh Walī Allāh is also of the opinion that a *muftī* must be a *mujtahid* in order to pass a *fatwah*. Shāh Walī Allāh, *‘Iqd al-Jīd*, p.89.

## CHAPTER IV.

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## Chapter IV.

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In the second chapter I dealt with the issue of extra-legal proposition((*maṣlaḥah* and *ʿurf*) which are vital sources of judicial flexibility, and in chapter three, I examined the inherent leeways in the concept of *ʿillah*. In this chapter I shall examine to what extent these leeways and extra-legal propositions play any meaningful role in the shaping of current orthodox rulings on matters pertaining to social exigencies. This chapter also highlights the many leeways produced by the "fertility" of language. Since *qiyās* is an integral part of the concept of *stare decisis*, syllogistic reasoning plays a major role in Islamic law. The following questions are dealt with in this chapter: To what extent is the judicial process controlled by the dictates of syllogistic argument? And, to what extent *can* the judicial process be controlled by syllogistic argument? This chapter is primarily directed towards the answers of these vital questions.

### 1. The Extent to which the Law is Controlled by Syllogism.

In order to examine the extent to which the law is influenced and shaped by syllogism, I have chosen to analyze two *fatwaḥs* directly relating to current social exigency.

Al-Azhar in Cairo and Dārul ʿUlūm in Deoband, India, have become to represent the highest authorities on matters pertaining to the *Sharīʿah*.<sup>1</sup> I

have therefore chosen a *fatwah* from each of these institutions and analyzed it in terms of its approach towards modern social needs.

Transplantation of human organs has over the last two decades become an integral part of modern medical science. One could therefore classify it as a legitimate social exigency. How does Islamic law view this new development? Is Islamic law flexible enough to accommodate this important social need ?

### **1.1 Al-Azhar's Fatwah (No.1323).**

As an interlude into the actual question of organ transplantation, the *fatwah*<sup>2</sup> reiterates the *Sharī'ah*'s respect and veneration for both the dead and the living by citing two Qur'ānic verses: "Do not destroy yourself" (2:195) and "Do not kill one another: (4:29).<sup>3</sup>

The first part of the *fatwah* deals with the question as to whether it is permissible to cut open the abdomen of a corpse, and if so, for what reason? A precedent is sought in the "works of the *Fuqahā'*" (jurists).<sup>4</sup> The closest precedent covering some dimensions of the instant case is found in the case where a pregnant woman dies and there are indications that the unborn child (foetus) is still alive in the deceased's womb. Should the abdomen of the women be cut open to save the life of the unborn child ? In another instance, is it permissible to retrieve a jewel (or something valuable) by slitting the belly of a deceased who had swallowed it prior to his death?

### The Ḥanafī View.

According to the Ḥanafī school, it is permissible to operate on the deceased in order to save the life of the unborn child. This act is rooted in the duty to save and protect life. To save life enjoys greater priority over respecting the dead.<sup>5</sup> As regards the issue of retrieving a valuable from the deceased's stomach, account is taken of two factors.<sup>6</sup> If the deceased swallowed something which belongs to him, the sanctity of the corpse enjoys priority over the retrieval of the valuable. If he swallowed someone else's valuable by mistake, and the injured party could be compensated from his estate, then splitting the belly of the corpse is not allowed. If, however, the deceased willfully and deliberately swallowed someone else's valuable, he forfeits any claim to sanctity, and the retrieval of the valuable by splitting the belly is permissible.

### The Shāfi'ī View.

Although the Shāfi'ī view concurs with the Ḥanafī's in respect of saving the life of the unborn child by operating on the deceased mother, it is based upon the doctrine of *ḍarūrah*.<sup>7</sup> The Shāfi'ī view uses the analogy of the case in which a person is facing imminent death through starvation. He is permitted to cut pieces of flesh from his body and consume it in order to stay alive.<sup>8</sup> The act of saving a life is regarded as the over-riding factor. Therefore, if the chances of saving the life of the unborn child are slim, the operation should not take place and the sanctity of the corpse should be observed.<sup>9</sup>

With regard to the retrieval of another's valuable from the deceased's stomach, it will depend upon the injured party who will have the preroga-

tive to either call for its retrieval, in which case, the slitting of the belly will be allowed, or he may forgo this right. If, however, the deceased swallowed his own possession, then some Shāfi'ī jurists feel that it should be retrieved because it belongs to the heirs. Others feel that its retrieval is not allowed.<sup>10</sup>

#### **The Mālikī View.**

The Mālikī view allows for the retrieval of a valuable from the deceased's stomach, irrespective of the ownership. It does not permit the operation on the deceased mother in order to save the child.<sup>11</sup>

#### **The Ḥanbalī View.**

The Ḥanbalī view only allows the retrieval of the swallowed valuable in the event of its value being considerable.<sup>12</sup> Saving the life of the unborn is only permitted if no surgery is involved. In other words, it is permitted to retrieve the child through the conventional means.<sup>13</sup>

#### **The Zaydiyyah View.**

According to this view, it is permissible to operate on the deceased in order to save the life of the unborn. They base their view upon the Qur'ānic verse: "Whoso saveth the live of one, it shall be as if he had saved the life of all mankind." (5:32)<sup>14</sup> After stating these views, the *fatwah* goes on to explain that for the purposes of this ruling, it was decided to adopt the views of the Shāfi'ī and the Ḥanafīs.

Once it has now been accepted that it is permissible to perform surgery on a dead body, provided there is justifiable reason for it, the *fatwah* moves on to the second part which deals indirectly with the question of transplan-

tation of organs from the deceased to the living.<sup>15</sup> In order to ascertain whether transplantation is permissible in terms of the *Sharī'ah*, the status of the dead body in terms of purity (*ṭahūr*) and impurity (*najāsah*), must first be established.<sup>16</sup>

#### Shāfi'ī's View.

According to Nawawī's (d.676/1295) view, the human corpse is not considered to be impure. The prohibition on the use of any part of the corpse was aimed at protecting the sanctity of the corpse and not because it was regarded as *najis*.<sup>17</sup>

#### Ḥanafī's View.

The Ḥanafīs regard the corpse as impure along with all other dead animals.

#### Mālikīs' View.

This view holds that the human body is *ṭāhir* (ritually pure).<sup>18</sup>

#### Ḥanbalīs' View.

The human corpse will be regarded as *ṭāhir* after it was bathed (*ghusl*).

#### Zaydiyyah's View.

The human corpse is *ṭāhir*.

Thus far the *fatwah* established from precedent that the act of performing



surgery on a corpse is permissible and that the status of the corpse is *ṭāhir*. The third part of the *fatwah* deals more directly with the issue of transplantation.

If one loses a tooth, is it permissible to replace it with another human's tooth? The Mālikī view holds that it is permissible to replace the lost tooth with another human's tooth.<sup>19</sup> The Ḥanafīs regard it as *makrūh* (disliked) even to replace the original tooth. To use another human's tooth is therefore not permitted. The tooth of a slaughtered animal could be used.<sup>20</sup> It would appear that no direct precedent with regard to the replacement of teeth could be found in the Ḥanbalī and Shāfi'ī *madhhabs*.

The fourth part of the *fatwah* deals with the consumption of human flesh by one facing imminent death through starvation.<sup>21</sup> The Ḥanafīs have ruled against eating of human flesh, even if it means dying of starvation.<sup>22</sup>

Some Mālikīs have ruled in favour of consuming the flesh of a dead human if it means staying alive. Others have disallowed it.<sup>23</sup> The Shāfi'īs and the Zaydīs have sanctioned the consumption of human flesh, when faced with death through starvation.<sup>24</sup>

After summarizing the above discussion, the *fatwah* moves rapidly towards its conclusion. The *fatwah* is satisfied that in the light of the cited precedents, enough scope could be found to sanction both organ transplantation and blood transfusion.

## **1.2 The Deobandī Fatwah.**

According to the Deobandī school<sup>25</sup>, blood transfusion and organ

transplantation fall under the same head, namely, the use of human components as a means of effecting cure. The whole thrust of the Deobandī *fatwah* is based upon three main propositions.

- (1) The sanctity of the human body (*takrīm*).
- (2) The position of man as trustee over his body (*amānah*).
- (3) The status of the human corpse in terms of *ṭāhir* (pure) and *najis* (impure).

The *fatwah* especially appropriates the issue of the impure status of blood and other separated parts of the body, and builds up a strong case for disallowing blood transfusion. Just before concluding, the *fatwah* strangely enough, accepts the legal maxim "necessity permits the unlawful" and rules in favour of it.<sup>26</sup> However, the Deobandī view on organ transplantation remains one of disapproval and rejection. The *fatwah* lays out in minute detail the extent to which it envisages the abuse to which the human body would be exposed if organ transplantation were to gain currency.<sup>27</sup> The *fatwah* also carries a lengthy newspaper report entitled "They trade in human corpse" in which it is reported that two British firms were supplying different educational institutions with human parts.<sup>28</sup> This act of subjecting the human body to abuse for monetary gain is viewed in a very serious light. The issue of monetary gain therefore becomes instrumental in disallowing organ transplantation.<sup>29</sup>

It is difficult to follow the reasoning that gives priority to the "sanctity" of the corpse over the issue of saving life. Using the issue of monetary gain, which is not applicable to the medical field, from which to judge the issue of organ transplantation appears to be an over-reaction, bearing in mind that the *fatwah* sanctions the buying of blood to save a life.<sup>30</sup> It is even

more difficult to follow the reasoning that underpins the sanctioning of blood transfusion while prohibiting the use of a deceased's organs in saving a life. If blood transfusion could be sanctioned out of necessity, so could organ transplantation.<sup>31</sup> The two are technically inseparable, as seen in the Azhar's *fatwah*. Either the use of human components are permissible or they are not. The *fatwah* is not against transplantation per se, because it permits the use of animal organs for medical purposes.<sup>32</sup> Hence, it must be assumed that the violation of the sanctity of the corpse must be the basis of the *fatwah* because the other two legal propositions namely, the issue of *amānah* and impurity applies to blood transfusion as well.

What becomes very clear about the whole construction of both *fatwahs* is their legalism. Only those dicta which could be admitted as legal propositions, were cited. It refused to address itself to the issue of social exigency. The whole question of saving life on modern terms was totally overlooked.<sup>33</sup> This implies that the whole exercise of saving life must be viewed strictly through the lens of the previous scholars whose rulings were not informed by advanced medical technology. This in turn implies a total disregard for the importance of extra-legal propositions.

The general tenor of the Qur'ān seems to support the notion that the saving of life must be one of man's utmost priorities. On the one hand the, Qur'ān commands us to save and protect life and on the other hand, it sets aside all restrictions when life is threatened. Man is therefore compelled to employ all his available skills in the protection and saving of life.<sup>34</sup> These skills cannot remain stagnant and must progress and be developed to the maximum of man's ability.

The mere fact that the Qur'ān explicitly sets aside all prohibitions on the consumption of *ḥarām* (forbidden) foodstuffs<sup>35</sup> in cases where life is threatened, must be the overriding factor. It would seem that the primary

exercise of the *fatwahs* was to present a syllogistically sound conclusion. But, if one were to carefully consider the soundness of the syllogistics of these *fatwahs*, it could be found lacking in many respects. To use the precedent of the replacement of a tooth as a premise to judge the issue of organ transplantation, which involves the issue of life and death, is syllogistically unacceptable. To use a case in which life is in no way threatened to judge a case in which life is threatened, cannot be acceptable.

The Deobandī *fatwah*, which posits the notion that the use of the deceased's organs tantamounts to a violation of the sanctity of the human body, impinges upon the use of language.<sup>36</sup> What is the actual meaning of according respect (*takrīm*) to the deceased? Does there exist one or many different connotations with respect to this term *takrīm*? Does modern society understand *takrīm* in the same sense as did those whose precedents are being cited? Does not the use of the term *takrīm* in this sense rather mean, not to dishonour? It would seem that the use of the deceased's organs to save a life, a noble task in itself, cannot in today's understanding be considered anything, but *takrīm* par excellence. Modern man is therefore inclined not to consider it a violation of the sanctity of the corpse, but rather an act of *ikrām* (honour) to use the deceased's organs to save a life. Man has always considered it an honour to risk or even lose his life in an attempt to save another's life. Communities have throughout history held men who sacrificed their lives saving their fellow human, in the highest of esteem. The same could be said with regard the issue of trusteeship over the body. Could something aimed at discharging one of the "five objectives" (*maqāṣid*) of the *Sharī'ah* namely, saving of life, be conceived as a violation of trust, or must it rather be considered an obligation to realize the clear intent of the law? Moreover, if it is permissible to "violate" the sanctity of the corpse for monetary gain, in the retrieval of a swallowed

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valuable, why could that permission not be extended to serve a more nobler cause?

The issue of impurity cannot per se function as a major premiss from which to judge the question of transplantation. This is so because of the legal maxim "necessity permits the unlawful"<sup>37</sup> which is extrapolated from the Qur'ānic verse (2:173) Even if the corpse were to be regarded as *najis*, it is not sufficient to prevent its use in the case where life is at stake.

It is not my primary aim to highlight any logical inconsistencies in these *fatwahs*. The point I wish to make is that the jurists all too often fail to realize that a good *fatwah* does not merely hinge upon its fidelity to syllogistic argument, but it also relies upon other important extra-legal propositions. As long as the *fatwah* is syllogistically sound, the need to consider extra-legal propositions is severely undermined.

Extra-legal propositions such as prevailing medical norms, legitimate social needs and contemporary man's understanding of the sanctity of a corpse failed to feature prominently in both these *fatwahs*. It chose rather to reduce the entire hermeneutical exercise to syllogistics. The *fatwah* attempts to construct for itself a solid major premise from which a natural conclusion would be forthcoming.

My thesis is not to argue in favour or against the question of organ transplantation and blood transfusion. I have the greatest respect and veneration for those votaries who delivered these rulings. My concern with these *fatāwa* is not to evaluate the final outcome, but merely to demonstrate that in reaching those outcomes, there is too much emphasis on syllogistic argument and too little or no consideration for vital extra-legal propositions. Any leeways that these extra-legal propositions could have afforded the jurists are either tragically neglected or totally ignored.

The highly skilled hermeneutical enterprise cannot be confined to the narrow strictures of syllogistic argument. Although I have limited my analysis to two *fatwahs*, a similar trend could be found in most of the *fatwahs* dealing with social emergencies.<sup>38</sup>

## **2. The Extent to which Syllogistic Argument can Direct the Judicial Process.**

When we refer, in a legal context to a good or proper conclusion, we may be referring to the relation of the conclusion to the premises upon which it is based. It may refer to the question whether the conclusion was derived by the employment of valid logical argument (syllogism) from the premises used. We must therefore be careful to think and refer to this as a "good" logical conclusion. This "good" logical conclusion may not necessarily be a "good" legal conclusion. Careful observance of this crucial distinction will substantially reduce the inherent danger of confusing a "good" logical conclusion with a "good" legal conclusion. Failure to distinguish the vital distinction between "good" legal and "good" logical conclusions, invariably leads to false assumptions. Among such assumptions is that premises for legal argument must at all times consist of pre-existing legal propositions.

### **2.1 Legal Propositions as Major Premises.**

The assumption that legal conclusions must be drawn and can only be drawn from premises that consist of legal propositions is not always true.

We have clearly seen this in the analysis of the doctrine of *maṣlaḥah* where the jurist is entitled to treat extra-legal propositions such as the prevailing norms (*ʿurf*) as premises from which to derive legal verdicts.

## 2.2 Need for Judicial Preference (Tarjīh).

Thus, the assumption that non-legal propositions may not serve as the major premises from which legal conclusions may be drawn, is false. Jurists may regard a verdict as "good" law even if the premise from which it flows is not a pre-existing legal proposition at all, as seen in the above mentioned examples of *ʿurf*. (see p.62)

The jurist is at all times saddled with the responsibility to *choose* which proposition within the range of indeterminacy, or among competing propositions, is to be applied to the instant case. A jurist's choice must be directed at achieving the best legal (not necessarily the best logical) verdict. In order to achieve this goal, the jurist may have to regard an available pre-existing legal proposition as inappropriate, because a more apt extra-legal proposition is available as a premise for arriving at the best legal verdict for the instant case. In the case of Abū Yūsuf's ruling on selling gold by measurement, an extra-legal proposition (the prevailing norm) was considered an appropriate major premise despite the existence of a legal proposition (prophetic injunction) prohibiting such a sale.

Moreover, the role of logical argument is severely restricted in cases where there are more than one existing legal proposition available, because logical argument from any particular one of them cannot be decisive for the instant legal conclusion. What is then decisive is the *choice* as major



premise of one rather than another of the available legal propositions and ultimately, of course, the reason, explicit or implicit, for choosing one rather than another. This became very clear in the Deobandī *fatwah* which chose to make a distinction between blood transfusion and organ transplantation. The major premise of *ḍarūrah* (necessity) was *chosen* and used as a basis for the conclusion which sanctioned blood transfusion. A different major premise, (violation of the sanctity of the corpse) was *chosen* upon which the ruling against organ transplantation was based. Moreover, the ultimate choice of premise is motivated by presupposed and often subjective criteria of choicemaking.

The decisiveness of sound logic in cases where alternative legal propositions or versions of legal propositions or extra-legal propositions are available as premises, cannot be the exclusive determinant for the instant case. The preliminary need to *choose* the most appropriate among available propositions, legal or extra-legal, to serve as a major premise for arriving at a legal conclusion for the instant case, is thus a main watershed which separates mere sound logical conclusions from sound legal conclusions.

In other words, the judicial process, especially in disputed questions of law, in so far as it involves such constant choicemaking, is not decisively controlled by mere soundness of logical argument from existing legal propositions.

The point I wish to emphasize is, in the case where the law is in dispute, the mere choice of premise, even from within the body of existing legal propositions which is used to formulate the legal conclusion for the instant facts, cannot be exclusively governed by those disputed legal propositions. A fortiori, it cannot be controlled or governed by mere logical inference from these legal propositions. Because logic cannot work to a compelling

conclusion except from a major premise which is indubitably the correct one, and this is obviously not the case when the law is in dispute. It is one thing how far logical inferences from existing legal propositions are compelling and decisive in reaching legal conclusions on disputed questions of law. It is quite another when and whether such logical inferences are appropriate and binding in other legal contexts as well. This vital distinction was not recognized in the cited *fatwahs*.

### 2.3 Logical Conclusions as Legal Propositions.

Converse to the erroneous assumption<sup>39</sup> that the premises for legal conclusions must consist of pre-existing legal proposition, is the assumption that if conclusions are drawn by *sound logic* from legal propositions, such logical conclusions must themselves be legal propositions. This second assumption assumes that if we can, from an existing legal proposition, draw logically sequential propositions for new current situations, then these sequential propositions are themselves legal propositions, binding for situations falling within their scope. Hence, we see that the precedent of replacing a lost tooth assumed legal status in al-Azhar's *fatwah*. In other words, it was cited as a legal proposition upon which future rulings could be based. It is obvious that this precedent was originally based upon some other legal proposition, because there is no clear *naṣṣ* governing the issue of replacing a tooth. This is to assume, even if not stated, that all the logical implications from existing propositions are also legal propositions. The reason why this cannot be so, is because the part of the subject-matter of law to which logic is relevant is itself only one abstracted aspect of the empirical reality of law, namely legal propositions; and legal propositions are normative phenomena rather than facts of existence. In empirical

reality, legal propositions operate in a context of certain techniques and ideals, that is, of certain ways of acting and mental attitudes of jurists; and also in the context of the social, economic, political and psychological facts affecting this action and these attitudes. But logical analysis is concerned only with the logical relations within the body of propositional material. It has to isolate the propositions from this fuller and richer, existential context.<sup>40</sup>

Furthermore, it follows from this standpoint that logical analysis cannot ever fully describe, much less exclusively control actual law. It is for this very purpose, that knowledge of the economic, social, psychological, political and other factors, that is, of the existential contexts which logical analysis of legal propositions omits, is of paramount importance. Ignorance of the social context of the law as well as apathy towards it, have induced many jurists to strictly confine themselves to the logical handling of legal propositions. This exercise of concentrating on the logical parameters of the law tends to exonerate the jurist from assuming responsibility for judicial choicemaking, which is an integral part of his rulings. In other words, the "correctness" of a ruling is sought in its fidelity to syllogism rather than to correct choicemaking.<sup>41</sup> Such rulings must obviously be lacking and deficient when the argument limits itself to the logical handling of legal propositions.

## **2.4 Barrenness of Logic.**

Once we have established that the outcomes of pure logical procedures do not always correspond to what necessarily is the most appropriate law for any actual Islamic community,<sup>42</sup> a much greater emphasis must be placed

upon locating and applying those procedures. Pure logical analysis may be invaluable for criticizing existing legal propositions by reference to a hypothetical model of internal logical consistency. They may also serve to test the extent to which a legal system can be conceived to be a logically consistent set of legal propositions. They may also serve for pedagogic easing of tasks of understanding, remembering and marshalling of legal propositions, but not as an exclusive determinant of a ruling.<sup>43</sup>

If it is, however, conceivable that by some marvelous combination of knowledge and social circumstances, all the existing legal proposition of a legal system could at a particular moment be rendered functionally desired and appropriate for conditions of that time and place, and also logically consistent with each other. So remarkable a conjecture of normative judgments and empirical realities with logical coherence could, however, if it were conceivable, only be momentary.<sup>44</sup> For, human conduct and relations against which we test appropriateness, and desirability, are themselves changing from moment to moment. If the imagined body of perfectly appropriate and mutually consistent legal propositions were to be adjusted, as it must be, to reflect such changes, the propositions of which it consists could not, except by an even greater miracle, remain capable of similar logical systemization for any length of time.<sup>45</sup>

There is a field of intellectual activity in law which is quite distinct from the performance of legal tasks. Its primary function is rather to concentrate on tracing and testing logical relations within a body of propositions. It is concerned with logical analysis, which is all too often confused with legal analysis. Most jurists are more likely to offer to explain their choices in terms of obedience to logic (syllogistically), rather than in terms of choicemaking based upon other criteria within legally available leeways.

It is by the introduction of new extra-legal propositions emerging from

experience to serve as premises, or by the experience-guided choice between competing legal propositions, rather than by the operation of logic upon existing legal propositions, that the growth of the law tends to be determined. The sooner the instant jurists realize this, the better the quality of their verdicts. Even if some reject any attempts to conceive the unity of the law in merely logical terms, they are however still saddled with the practical reality of this idea of unity as operative in the actual working of the law, as clearly seen in the handling of questions relating to modern society. Conceiving the unity of the law in logical terms tends to undermine the crucial role of extra-legal factors in the judicial process which is designed to cope with any changing reality. It is also primarily responsible for the disparity which clearly exists between legal theory and the rulings of many of the jurists.

Many jurists still fail to admit that cases do arise which require a judicial choice *free* of logical compulsion, either because a substantial part of the facts are of first impression and because there is a conflict of pre-existing legal propositions. This is clearly seen in the current state of the judicial process where decisions and commentaries still take the form of logical derivation and logical testing.

Part of the solution to this problem lies in reframing current theories of precedent. Instead of seeing precedent as containing merely legal propositions of general force, independent of their original context, to be used as major premises upon which future legal rules are to be based, it (precedent) should be seen as illustrating a probably accurate result in another context for comparison with the present.

### **3. Packaging of the Law.**

The above discussion shows how a good legal conclusion often arises outside the ambit of merely logical operation. Having no existential reference, logic is totally dependent for its conclusions on the *choice* of premises. Because of the nature of language in which premises are thus framed, logic will often point to more than one conclusion, alternative, but mutually inconsistent. It is common knowledge that language thus causes difficulties which both afflict and enrich jurists. The main problem lies with the very nature of ordinary language itself. All legal propositions are expressed largely in ordinary language, and are thus endowed with the inherent semantic qualities of ordinary language.

I shall endeavour to illustrate how these ordinary qualities of language, and the operational implications which flow from them, constitutes another vital source of leeways for the jurists.

#### **3.1 Problems Presented by the Semantics of Language.**

The problems presented by language to the judicial process involve those aspects of semantics which study the relation between words and to what these words refer. This is itself a complex phenomenon. It comprises firstly, of the reference of the symbol in the minds of the transmitter and the receiver of the message, which is the idea to which the symbol corresponds. And secondly, the thing to which the words refer, (the referent) cor-

responding, usually, but not always in the external world to the idea to which the symbol corresponds.<sup>46</sup> This correspondence is comparatively easy to see in the case of a tangible entity like a car, where we can link the reference as well as the referent to a physical entity easily perceptible and recognizable by the physical senses. The recipient of the message can thus feel safe to believe that the reference in the mind of the transmitter is identical, or close to the reference in his own mind because the referent is a tangible entity.

Things get much more confusing and complicated when we move to such non-tangible referents, as *maṣlahah*, *istiḥsān* and *maqāṣid*.

There is in such cases no entity perceptible by the senses as a referent which guides the recipient of the message to the reference in the mind of the transmitter, or guides the observer to the reference in both these minds. In such cases, the chances are radically reduced of the recipient's reference being identical to the transmitter's.

Language is regarded as being plurisignative because words are symbols, and they have no meaning per se. Their meaning consists in the references in the minds of persons between whom they are used as a means of communication. Among the effects of this is that words may have different and occasionally opposite connotations which in turn may change through the stream of time in which they are used. Although words may potentially bear many meanings as they appear in different verbal contexts and at different points in time and space, the number of possible meanings can conceivably be reduced on a particular occasion to a limited number of meanings. This could be done by reading the words syntactically in their sentences and reading the sentences in their contexts. The context in which the word is used becomes the ultimate determinant of its meaning.

It thus become crucial for jurists to recognize that, in addition to the diverse meanings born out by a symbol at any one time, the symbol itself changes

or acquires a proliferation of meaning in the process of human activity in time. The changes of meaning depends on the unfolding of social life and its bearing on language usage in the course of time. A word may not only change, but reverse its meaning; for example, the word "invaluable" at one time meant "valueless".<sup>47</sup> Bearing in mind the fact that the content of the symbol often becomes in time emancipated from the reference in the mind of the original communicator, it becomes imperative for the instant jurist to address himself not only to the meaning of the literal word, but more so to the referent and its context.

In order to determine the accuracy of the correspondence of the referent in the minds of the transmitter (writer) and the receiver(reader), the emphasis may have to shift to the reference in the mind of the receiver some centuries later. The jurist of today cannot be expected to be privy to the intentions of jurists, especially generations or centuries ago, except through the present reference in their own minds of the written words recorded by those jurists.

Jurists of the same era, sharing the same contextual setting, are bound to conjure up different connotations of abstract and non-tangible concepts. A fortiori, jurists whose contextual settings are centuries apart, will and must assume different connotations. To expect all present jurists to assume identical connotations in such ubiquitous matters as *maṣlahah*, would be a pervasive and constant inequity, if indeed, it were substantially practicable at all.



### 3.2 The Fertility of Language and the Ratio.

The assumption that each case has one single *ratio* binding on all later jurists of the same school, cannot be accepted in the face of the fact that a potentially unlimited variety of later jurists will be preoccupied in their varying contexts with their search for meaning. The semantic qualities of language reinforce the doubts about what can be meant by searching and discovering the one single *ratio decidendi* of previous judgments. Success in such a search would require the "complex of discourse"<sup>48</sup> of one or many jurists, constituting the precedents on a particular point, to be capable of bearing only one meaning. Semantic realities of language, as we have already illustrated, preclude any such possibility. Such a single meaning would have to be discoverable, and discoverable with identical scope, by all future generations of jurists, for all future times, despite the vastly diverse and unforeseeable contexts and range of problems that they face. Each later jurist cannot avoid reading the words of the precedents with such changed meanings as time has infused into them, and in a context which includes the problems the later jurist faces.<sup>49</sup> If in these circumstances, we still wish to insist on the present jurist finding the *ratio* of the precedent jurist, I have to say that the present jurist, with the aid of hindsight, simply *chooses* the *ratio* that he thinks most apt.<sup>50</sup> Language and in general all ostensive indicators of language serve to anchor discourse in the circumstantial reality which surrounds the instance of discourse. Thus, in living speech, the ideal meaning of what one says bends towards a real reference, namely that "about which" one speaks "This is no longer the case when a text takes the place of speech .... A text.. is not without reference, it will be precisely the task of reading, as interpretation, to actualize the

reference."<sup>51</sup> Most scholars subscribe to the notion that every literary text is in some way burdened with its occasion, with the plain empirical realities from which it emerged.<sup>52</sup>

Edward Said, in his celebrated work, *The World, the Text, and the Critic*, clearly emphasizes this point:

My position is that texts are worldly, to some degree they are events, even when they appear to deny it, they are nevertheless part of the social world, human life, and of course the historical moments in which they are located and interpreted.<sup>53</sup>

Stanley Fish who has written extensively on the subject, believes that every act of interpretation is made possible and given force by an interpretive community.<sup>54</sup> If this is so, then we must go a great deal further in showing what situation, what historical and social configuration, what political interests are concretely entailed by the very existence of interpretive communities. This is an especially important and complex task when these communities have evolved camouflaging jargons.<sup>55</sup>

### 3.3 Language and the Zāhirīs.

During the eleventh century, there existed a remarkably advanced and highly sophisticated school of Islamic philosophic grammarians in Andalusia.<sup>56</sup> One small group of linguists and theoretical grammarians, are renowned for their profound scholarship; Ibn Ḥazm, Ibn Jinnī, and Ibn Mada al-Qurṭubī. All of them belonged to the Zāhirī school<sup>57</sup> and taught

in Cordoba during the eleventh century. They were antagonists of the *Bāṭinist* (internal, esoteric) view that espoused the notion that meaning in language is concealed within the words; meaning is therefore only attained as a result of inward-tending exegesis.<sup>58</sup> The *Ẓāhirīs* argued that words possessed only a clear, apparent, surface meaning, one that was linked to a particular usage, circumstance, historical and religious event.<sup>59</sup> The *Ẓāhirīs* vs *Bāṭinīs* debate was rooted in the polemics which surrounded the approach to the exegesis of the sacred text, the *Qur'ān*. The Cordovian *Ẓāhirīs* rejected the excesses of the *Bāṭinīs*, arguing that the obsession with language was an invitation and licence to spinning out private meanings in an otherwise divinely pronounced, and hence immutable text.

Ibn Mada strongly attacked this view and argued that it was absurd even to associate grammar with the logic of understanding. Grammar as a science, assumed and very often proceeded to create by retrospection, ideas about the use and meaning of words that implied a concealed level beneath words, available only to initiates.<sup>60</sup> It is obvious that once you resort to such a level, anything becomes acceptable by way of interpretation, because there can be no fixed meaning, no acceptable control over what the words in fact say.

It would seem that the *Ẓāhirīs* wanted to pin down meanings of language by reference to some empirically observed core of common language. The *Qur'ān*, according to the *Ẓāhirī* school, is a text that incorporates speaking and writing, reading and telling (*iqra and qul*). *Ẓāhirī* interpretation itself accepts as inevitable, not the disjunction between texts and its circumstantiality, but rather their compulsory interplay.<sup>61</sup> It is precisely this interplay, this constitutive interaction, that makes the *Ẓāhirī* notion of meaning possible. This theory of interpretation represents an articulate thesis dealing with a text in a significant form, in which circumstantiality, the text's status as an event having "sensuous particularity" as well as "historical

contingency", are considered as being incorporated in the text, a solid part of its capacity for conveying and producing meaning.<sup>62</sup> This clearly means that a text must have a specific situation, which restricts the interpreter and his interpretation, not because the situation is hidden within the text as an esoteric mystery, but rather because the situation exists at the same level of surface particularity as the textual object itself.<sup>63</sup> The text itself imposes constraints upon their interpretation, or to put it in the words of Edward Said, "...the closeness of the world's body to the text's body forces readers to take both into consideration."<sup>64</sup>

Hence, whatever a jurist may do, semantic considerations indicate that he cannot fix the "ordinary" meaning to be found by literal interpretations for all future interpreters. This is primarily due, as we have demonstrated, to the fact that the words of his code which are in common usage at the time of its formulation are subject to the principle of plurisignation, and to semantic change with the flux of time in which language as a social phenomena par excellence, moves. Although there is little doubt that some limits can be set on the plurality of meanings by the careful use of words, especially technical legal terms, which are less susceptible to chance, a word is rarely unisignative. Moreover, no law consists entirely of technical legal terms, and the cannon prescribing the literal interpretation according to the ordinary meaning is in any case not applicable to such precise technical terms.

### **3.4 The intention of the Jurist.**

The widely accepted principle of interpretation of legal phenomena, which makes the intention of the jurist the exclusive determinant of his code, is

also fraught with much of the same semantical problems encountered in language. The error of substituting the jurist's intention for meaning of language is that it tends to ignore the crucial fact that a written work, once created, acquires a meaning which, though dependent on men's usage, may be independent of its author's motives. Interpretation thus becomes precisely a search for this meaning. As already noted, the later jurists cannot be privy to the previous jurist's intentions, except so far as the words used, convey these. A fortiori, succeeding generations, to whom the text applies, can only be held bound by the meaning of its words to them. To hold them to some pristine intention of the author, even if this were possible, would be an unfair imposition that requires all future jurists to understand words addressed to them in some meaning which they may not convey. Hence, it must be conceded that the original author must have intended that his language should bind according to the community's understanding of it at the time of its creation, rather than some pure, permanent, discoverable meaning. This is the basis of the judicial emphasis on the ordinary meaning of words when this does not lead to absurdity. It insists that this ordinary meaning should be sought in the usage and social situation of the generation in which the question arises.<sup>65</sup> In many circumstances, a good deal of the instant jurist's invocation of the preceding jurists' intentions, must be regarded as fictitious and sometimes ritual, which is designed to conceal the unavoidable creative choices involved in interpreting and applying previous rulings to current exigencies. Sometimes, highly subjective intentions and motives are read into previous rulings in order to give authenticity and plausibility to the current ruling.

The problem with many classical Islamic rulings and verdicts is, that they became canonized without proper recording of the *rationes* upon which they were based. When a classical *mujtahid* quotes a Qur'ānic text in substantiation of a certain verdict, it is misunderstood as being the ex-

clusive determinant of the verdict, but in the light of the above discussion, it must be conceded that the text per se is not the determinant, but rather the *ratio legis* embraced by the text is the determinant. Hence, the factors that contribute towards the interpretative exercise of extrapolating the *ratio legis* is as vital to the conclusion as the text itself. From this semantic standpoint, it becomes clear that to assume that there can be only one *ratio* of a case, and that such one *ratio* is discoverable by all jurists, present, past and future, is to deny the semantic realities of language. The purposive nature of language and the complex of symbols constituting it, are deeply involved in arriving at a conclusion.<sup>66</sup> It would virtually be a semantic miracle if in all cases, any one meaning of such a complex of discourse should present itself as the only correct meaning to all readers. In this semantic perspective, indeed, it is difficult even to see what can be meant by searching for the one *ratio* for the instant case. To expect to find such a single *ratio* is to assume that, what is usually a vast complex of discourse can have only one meaning. This is obviously a gross repudiation of the semantic insight that whether we are dealing with a word, or a judgement, the principle of plurisignation and semantic change operate. This was clearly demonstrated by the examples quoted. In the Deobandī *fatwah* the issue of *takrīm* was used as a premiss to justify a certain verdict. What constitutes *takrīm* (honour) changes with the time and space and therefore any verdict based upon such "changing" phenomena, cannot be permanently binding.

The area of the meaning of each word is somewhat delimited syntactically in its sentence, and restricted by the contextual environment of each sentence, and the whole complex of discourse, by a host of issues any of which the jurist may appropriate as the issue in the case, and moreover by the social situation within which the issue arises.<sup>67</sup>

#### 4. Precedent as a Complex of Judicial Discourse.

Precedent is therefore not a straight-forward dictum espousing a clear and unambiguous directive, but rather a complex of judicial discourse. When this complex of judicial discourse is sought to be appropriated by the instant jurist as a precedent, the different situations in the later social situation may widen the possible area of meaning of the earlier judicial discourse.<sup>68</sup> The continuing openness of previous decisions to reinterpretation of their supposed *ratio* in successive generations with different social needs and experience, was a fact that was acknowledged by classical jurists such as Ibn ʿAbidīn:

My view is that many of the verdicts arrived at by the muftahid were based upon the ʿurf of his time, so much so that had the present ʿurf prevailed during his time, he would have contradicted his original ruling and ruled in favour of the present ʿurf.<sup>69</sup>

In summary, then, whatever method of seeking the *ratio* of the case we employ, it must take account of the meaning of the judgment as a "complex of discourse". The extrapolation of the *ratio* from this complex of discourse becomes subject to semantic problems which render quite illusory the assumption that there is only one possible correct meaning. These problems ensure that the discourse will bear many possible meanings. If these many possible meanings of each decision were reflected in one correct *ratio*, it must be considered to be a most extraordinary coincidence.<sup>70</sup> The semantic aspects of the *ratio* problem, when joined with the

logical and linguistic aspects already covered, must create ample leeways, in which case the central role of choicemaking cannot be over emphasized.

The idea is to locate justifiable leeways for the play of contemporary judicial insight and wisdom. At the same time judicial attention should be closely attuned to the context, experience and considerations shown by the earlier rulings of the jurists, and to the demands of logical consistency,

#### **4.1 The Contextual Settings of Precedent.**

One of the most striking features of Islamic law, when compared with the two other major Islamic disciplines, namely, *tafsīr* (Qur'ānic exegesis) and *Ḥadīth*, is the marked absence of any significant discussion relating to the context of the ruling.

At most, the classical works on Islamic law will enter into detailed discussions as to how loyal and true the rulings are in terms of syllogistic argument, to the principles (*naṣṣ*) upon which they are supposedly based. Law books are compilation of verdicts disembodied from their contexts. They are recordings of rulings minus their contextual settings. This system of recording verdicts without any due attention to the context from which they emerged, is unique when compared to other legal systems, such as the British Common Law system and the American Constitutional system. In these systems the context which gave rise to the ruling is as important as the ruling itself. No future ruling will exclude an exhaustive and comprehensive scrutiny of the context of the previous ruling. The ruling which is handed down in the form of a judgment clearly reflects and includes the train of argument of the judge. His *ratio decidendi* is well supported by all the material facts relevant to the ruling.



The problem that continually confronts a Muslim jurist is how to apply a previous ruling to a contemporary situation while he is totally left guessing as to the precise nature of the context from which the ruling emerged. Islamic law is unlike the disciplines of *tafsīr* and *ḥadīth* where any application or understanding of the text is closely integrated with the contextual settings of the text. Hence, any attempt at Qur'ānic exegesis must involve a scrutiny of the "occasions of revelation" (*asbāb al-nuzūl*). The emphasis on citing the *asbāb al-nuzūl* is indicative of the fact that the contextual setting of the verse is ostensibly crucial to the understanding and application of that verse.

In the case of Islamic law, which is recorded in countless volumes, the trend developed among the jurists to merely record the ruling and at most, to explain how the ruling is justifiable in terms of syllogistic argument. It would seem that this crucial development emerged as a corollary to the "immutable" view. In other words, the ruling once given, is immutable irrespective of the context from which it emerged. The later jurist is therefore "bound" to apply the previous ruling without any comprehensive scrutiny of the original context. This is to assume that the original context had no significant bearing upon the ruling. This in turn amounts to an unjustified denial of the many existential factors, be they social, economic, and political that interact with the jurist and finally shapes his discretion which results in a legal verdict that is best suited to that context, or at least, aimed at the context.

It is common knowledge that many rulings emerged in direct response to a temporary exigency which fades with time. The whole issue of "*mansūkh*" (abrogated texts) is based upon the existence of temporary exigencies. Furthermore, it is inconceivable that an elaborate and comprehensive legal system such as Islam's did not take into account the current needs of the community and its direct bearing upon the interpretation and application

of the law. The point I wish to make is that the instant jurist is at a distinct disadvantage when applying a previous ruling without being aware of the precise context from which that ruling emerged. It is like having to read an answer without having access to the question. Although it may be possible to determine from the answer an approximate notion of the question, the real sense of the answer can only be conceived in the light of the actual question.

The instant jurist is at a disadvantage for three reasons.

First, since the previous rulings have been handed down "disembodied" from their original contexts, he cannot establish beyond all doubt whether the conditions which gave rise to the ruling are identical to the instant conditions. Since rulings must be read in the light of the facts of the case in which they were delivered, the instant jurist is then compelled to presume that the instant context and the original context are identical. His efforts to ascertain the *ratio decidendi* cannot be brought to complete fruition, because the vital indicators are embedded in the "missing context" of the previous ruling. Had the context accompanied the ruling, the instant jurist would have been in a considerably better position to judge the instant facts.

On the one hand, legal theory demands that every ruling must have a *ratio decidendi*, and on the other hand, the facts from which such a *ratio* could be inferred, are missing. The problem is compounded by the practice of later scholars of "attributing" reasons and explanations, which they assumed to be the *ratio decidendi* of the ruling, to the ruling jurist. This practice of "attributing" reasons appears to have been precipitated by the jurist's need to vindicate the *madhhab* to which he subscribed, especially in the face of an intellectual onslaught from an opposing *madhhab*.<sup>71</sup> In an attempt to establish the superiority of his *madhhab*'s position vis-à-vis the

other *madhāhib* (pl. of *madhhab*), the jurist invoked numerous assumed<sup>72</sup> reasons in substantiation of the ruling.

Faced with no or little prospect of being enlightened by the facts that gave birth to the precedent, the instant jurist is inevitably compelled to seek justification for his ruling in the realm of syllogistic argument.

Second, the instant jurist is deprived of the many leeways that would have been afforded to him, had he been able to thoroughly scrutinize the original context. The extent of leeways will depend on how the instant jurist can accurately place the contextual setting of the original ruling. The factors that earlier jurist were compelled to consider may no longer be applicable or relevant to the instant case, but since this information is not available, the instant jurist cannot appropriate those inherent leeways.

Moreover, when the instant jurist is faced with the prospect of having to make a judicial choice from among competing verdicts of the same jurist, his dilemma is increased. Legal theorists have grappled with this problem and attempted to sketch guidelines directed at stabilizing the complex issue of judicial preference (*tarjīh*).<sup>73</sup> When two or more competing verdicts on one issue have been reported from a single jurist, it becomes the obligatory task of the later jurists to give preference to one verdict.<sup>74</sup> Although the legal theorists have prescribed a preference giving methodology (*tarjīh bayn al-adillah*), they are compelled to admit that in the final analysis, it is up to the jurist to decide what the ultimate grounds of preference must be. There are too many complicated factors which could sway a decision in any direction.<sup>75</sup> A rational explanation for the existence of more than one opposing verdict could be sought in the context of the particular verdict. If, for the sake of argument we say that verdict A emerged in direct response to situation X, and verdict B emerged in response to situation Y and finally verdict C emerged in response to situation Z, then I am sure that no jurist need to engage in the highly subjective task of having to give

preference to any one verdict. Under the circumstances, he is quite safe to regard all three mutually inconsistent verdicts as "binding" and authoritative in their contexts. In which case, it would no longer be (*wājib*) obligatory to give preference.

If on the other hand, we are ignorant and uninformed of the different contexts out of which the opposing verdicts emerged, we are stranded with verdicts, disembodied from their contextual settings, hence exercising judicial preference is the *only* option open to us. Some jurists have attempted to reconstruct the contextual settings of some verdicts, but unfortunately it was mostly aimed, not at establishing the *ratio decidendi* and the material facts upon which the ruling was based, but rather directed at determining the time period of the rulings. Once they ascertained which ruling was the later one (*al-qawl al-akhīr*: last verdict), they assumed that all other previous rulings are abrogated or retracted.<sup>76</sup> A classical example of this dilemma is to be found in the works on al-Shāfiʿī's *fiqh*. Imām al-Shāfiʿī is renowned to be "*ṣāhib al-qawlayn*" (one with two verdicts). Faced with the arduous task of having to reconcile more than one mutually inconsistent view of al-Shāfiʿī, later scholars made a broad distinction between the two. Classifying the one view as "new" or "revised" (*al-qawl al-jadīd*) and the other as "old" (*al-qawl al-qadīm*). In terms of the *uṣūl al-fiqh*, it is impermissible to attribute any retracted ruling to the jurist, once it has been carefully established that he made such a retraction.<sup>77</sup> Establishing the time period of the different rulings, and assuming from it that all previous rulings in terms of time were retracted or abrogated, is as one can see, reducing the complex judicial process to a superficial exercise. If this method were to be accepted, then it would mean that all the verdicts which al-Shāfiʿī gave during his stay in Iraq should be regarded as retracted or abrogated, because his subsequent verdicts which were recorded in Egypt were in terms of time, final (*al-qawl al-akhīr*). This is clearly not so because, had this been the case,

it would not have been proper for the later Shāfiʿī jurists such as Haytamī and Nawawī to give preference to the "old", (retracted or abrogated) view of al-Shāfiʿī. We find examples of the *fatwah* (ruling) being passed by later jurists in favour of the "old" view.

Third, the instant jurist's grounds for deviating from the previous ruling is severely curtailed and he is virtually imprisoned by the "binding" and coercive force of precedent. Had the basis of the previous ruling been extended beyond the barren barriers of syllogistic argument to the fertility of language and context, he would have had amply leeway to justify a departure from precedent. As matters now stand, the instant jurist has no legal room to depart, other than finding a logical loophole.

From this discussion it would seem that the entire post-classical judicial process evolved around the immutable view with *stare decisis* as its operating principle. Hence, in terms of this system which is rooted in the doctrine of *stare decisis*, as long as a ruling is syllogistically sound, any future departure from it is effectively frustrated. This was achieved by the practice of deliberately omitting the *rationes* and the contextual settings when recording the rulings. By omitting the *ratio* when recording the ruling, future jurists are left with no grounds (other than syllogism) for departing from precedent.

#### 4.2 Why Omit the Rationes and Contextual Settings?

Any reference of the instant jurist to a flaw, error or inapplicability of the "assumed" *ratio* of the previous jurist's ruling, is simply dismissed by denying that the *ratio* referred to, was in fact the *ratio* of the previous ruling.

Since the *ratio* of the previous ruling is not recorded, the instant jurist is forced into the realm of conjecture which affords the previous ruling the luxury of remaining an illusive enigma while at the same time denying the instant jurist the vital grounds for departure. At most, the instant jurist may assume what the *ratio* of the previous ruling is, but his attempt to use it as a basis of departure is effectively frustrated because it would then be based upon a non-recorded, "assumed" *ratio* which could be easily dismissed.

Since we have demonstrated the importance of the original or the existential context and its vital role in the final ruling could serve as an important source of leeways upon which any future departure could be based. The deliberate failure to accord due prominence to the context in response to which a law emerged, could be conceived, firstly, as a direct result of the notion that Islamic law is immutable and once pronounced, becomes binding for all future generations, irrespective of the differing contexts.

Secondly, it entrenches the belief that the *ijtihād* of the classical jurists are not to be challenged or overruled. This is achieved by omitting vital potential grounds for departure. In other words, deliberately withholding potential grounds for departure is also to effectively elevate the ruling to the untouchable realm. To explain, to give reasons, to theorize is to invite accountability, to expose oneself to criticism and refutation. This was to be obviated if the classical treasure was to remain intact. I have endeavoured to show that more than one and often numerous potential, competing *rationes* are to be expected when precedents are invoked, especially in areas of disputed law. The present study, therefore, places major emphasis upon the crucial role of judicial choicemaking. By judicial choicemaking, I mean the task of the instant *mufī* to choose between more than one, often between conflicting potential *rationes*. In so far as these potential *rationes* offer conflicting solutions for the instant case, no single *ratio* can strictly claim to bind the later jurist. Within the tradition of precedent, we now find

enough leeway afforded to the instant jurist to combine many factors, legal and extra-legal to arrive at the most appropriate ruling. In addition to this leeway is the inherent leeways of language.

Despite the existence and legitimacy of these leeways, we still find syllogistic argument exerting a the stranglehold over the orthodox judicial process. In other words, the barrenness of logic enjoys priority of the other more fertile processes. The same set of facts may look entirely different to two different jurists.<sup>78</sup> The jurist bases his conclusions upon a set of facts *selected* by him as material from among a larger mass of facts, some of which might seem significant to a layman, but are conceived by the jurist as immaterial and irrelevant. The jurist, therefore, arrives at a conclusion based upon the facts as *he sees* them. It is on these material facts that he bases his judgment, and not on any others. Hence, it becomes the task of the later jurist not merely to state the facts and the conclusion of the previous ruling, but to determine the material facts as seen by the previous jurist and his conclusion based upon them. This exercise of determining the material facts of the previous ruling is one that is fraught with difficulty. There is unfortunately no definite method of ascertaining what the material facts of the precedent are.

In the case where the ruling is transmitted without a statement of the jurist's legal reasoning, it becomes virtually a matter of guesswork for the latter jurist to establish the material facts upon which the previous jurist based his conclusion. Again it must be emphasized that the later jurist is again faced with the unavoidable task of choosing the facts he assumes were the basis of the precedent. To ignore or disregard the later jurist's vital choice, (of material facts he assumed to be the basis of the previous ruling) is to reduce the whole judicial process to a meaningless exercise.

It is therefore extremely essential to trace the train of thought, the line of

argument and the choice of material facts of the previous jurist, so as to serve as a guide for the instant jurists. To divorce the conclusion from the material facts upon which that conclusion rested, is like removing the foundation and expect the structure to be solid. Sometimes jurists think that they are in happy agreement on the facts when they in actual fact concur in result only. The agreement of the Deobandīs and the Azharīs on the question of blood transfusion is a typical example.

Having established the *ratio decidendi* of a case, and excluded all dicta, the final step is to determine whether or not it is a binding precedent for the instant case in which the facts are *prima facie* similar. This obviously involves a double analysis; firstly, it involves establishing the *ratio decidendi* and the material facts of the precedent and secondly, it entails determining the material facts of the instant case. If these are identical, and *only* if they are identical, then the precedent is "binding" on the instant case. If, however, there exists any doubt as to the identical nature of the two sets of material facts then it follows that the precedent is not "binding". Any departure from the previous ruling on such basis cannot be construed as departure from precedent, because in actual fact, the previous ruling is not to be considered "precedent" but rather applicable to a "different" set of circumstances. It is on this score that I submit that most contemporary jurists have grossly erred. Any departure based on differing material facts of the precedent and instant case, is viewed as an unholy "deviation" from the assumed "binding precedent". Deviation and departure are conceived as "wrong" conclusions irrespective of the leeways presented by the differing material facts. The point I wish to stress is that a different conclusion does not necessary mean or imply departure from "precedent". Departure or deviation would have occurred when, and only when, despite the two sets of material facts established in the precedent and the instant case being identical, two different conclusions are reached. In this case, the later



ruling would be considered as a departure from the precedent. In other words, to establish a departure or deviation, it is not sufficient to view the conclusions. Rather it is essential to establish the identical or unidentical nature of the material facts, upon which the conclusions were based.

### NOTES FOR CHAPTER IV.

1. These two institutions have over the last two centuries played an important role in ruling on matters of social importance. They represent the orthodox Sunni view par excellence. For a historical study of al-Azhar see, Bayard Dodge, *Al-Azhar: A Millennium of Muslim Learning* (Washington, 1961).  
For an excellent study of Deoband see, Barbara Metcalf, *Islamic Revival in British India: Deoband, 1860-1900* (Princeton, 1982).
2. Jād al-Haq, *Al-Fatāwa al-Islāmī* (Cairo, 1982), pp.3707-3715.
3. *Ibid.*, p.3705.
4. *Ibid.*, p.3705.
5. *Ibid.*, p.3705.
6. The two factors are ownership and intent.
7. *Ibid.*, p.3706.
8. This act of cannibalism practiced on oneself in order to stay alive, is not allowed by the Hanafīs. Muftī Muḥammed Shafī<sup>c</sup>, *Insāni A'zā Kī Pairvankarī* (Karachi, 1968), p.37.
9. Jād al-Haq, *Al-Fatāwa al-Islāmī* (Cairo, 1982), p.3706.
10. *Ibid.*, p.3606.
11. *Ibid.*, p.3706.
12. *Ibid.*, p.3706.
13. *Ibid.*, p.3706.
14. *Ibid.*, p.3707.
15. *Ibid.*, p.3707.
16. If the corpse is regarded as impure (*najis*) then it goes without saying that the use of any "impure" organ will not be permitted. On the other had, if the corpse is regarded to be *ṭāhir*, then only can the question of permissibility of organ transplant proceed. Hence the whole question of the status of the corpse is discussed.
17. *Ibid.*, p.3707.
18. *Ibid.*, p.3707.

19. *Ibid.*, p.3709.
20. *Ibid.*, p.3709.
21. *Ibid.*, p.3711.
22. *Ibid.*, p.3711.
23. *Ibid.*, p.3711.
24. *Ibid.*, p.3711.
25. Muftī Muḥammad Shafīʿ, *Insānī A'zā Kī Pairvankarī* (Karachi, 1968), pp.1-40. also;  
*"Al-Tibyān li Ḥukm al-Tadāwi bi dam al-Insān"* in *Ālātī Jadīdah* (Karachi, 1961), pp.122-124.  
The *fatwās* of Muftī Muḥammad Shafīʿ is considered to be the Deobandī view par excellence. His view will therefore be referred to as the Deobandī view. His *fatwah* is also endorsed by the Muftī Maḥdī Ḥasan of Dārul ʿUlūm of Deoband as well as sixteen other *muftīs* from virtually all the Deobandī seminaries through the Indo-Pak sub-continent.
26. *Ibid.*, p.24.
27. *Ibid.*, pp.31-35.
28. *Ibid.*, pp.32-33.
29. *Ibid.*, p.34.
30. *Ibid.*, p.26. If blood could not be obtained freely, then its purchase is permissible. Selling blood is not allowed.
31. Blood is finally compared to the female's milk which is permissible to use. *Ibid.*, p.25.
32. *Ibid.*, p.30. The *fatwah* particularly excludes use of organs from pigs and dogs. They are considered to be *najis*. Hence, only those animals whose flesh a Muslim may consume, could be used, provided it is slaughtered in the prescribed manner.
33. The Deobandī *fatwah* only concentrates on the negative side of organ transplantation and does not mention any positive dimension.
34. This is clearly one of the "five objectives" of the *Sharīʿah*
35. Qur'ān: (2:173)

36. The issue of language will be dealt with shortly.
37. Ibn Nujaym, *al-Ashbāh wa al-Nazā'ir*, pp.85.
38. The preoccupation with syllogistic argument is clearly seen in most *fatwahs* dealing with social problems. See, Khālīd Mas 'ūd, *Trends in the Interpretation of Islamic Law as Reflected in the Fatāwā Literature of the Deoband School: A Study of the Attitudes of the 'Ulamā' of Deoband to Certain Social Problems and Inventions*. M.A. thesis, Institute of Islamic Studies, McGill University, 1969. Also Muḥammad Shafī', *Ālātī Jadīdah* (Karachi, n.d.).
39. This is the second erroneous assumption under which the instant jurist usually labours.
40. J. Stone, *Precedent and Law Dynamics of Common Law Growth* (Melbourne, 1985), p.45.
41. This point will be duly demonstrated when the *fatwahs* will be analysed.
42. This point is further illustrated in the analysis of the *fatwahs* on organ transplantation.
43. J. Stone, *op.cit.*, p.45.
44. *Ibid.*, p.46.
45. *Ibid.*, p.56.
46. *Ibid.*, p.50.
47. *Ibid.*, p.52.
48. This is a phrase which was coined by the famous jurist Julius Stone.
49. *Ibid.*, p.58.
50. *Ibid.*, p.59.
51. Paul Ricoeur, "What Is a Text? Explanation and Interpretation", in David Rasmussen, *Mythic-Symbolic Language and Philosophical Anthropology: A Constructive Interpretation of the Thought of Paul Ricoeur* (Nijhoff: The Hague, 1971), p.138.
52. Edward Said, *The World, the Text, and the Critic* (Britain, 1984), p.35.
53. *Ibid.*, p.4.  
"Each essay in this book affirms the connection between texts and the existential actualities of human life, politics, societies and events."

The realities of power and authority as well as the resistances offered by men, women, and social movements to institutions, authorities, orthodoxies, are realities that solicit the attention of critics. I propose that these realities are what should be taken account of by criticism and the critical consciousness in the recent past." *Ibid.*, p.5.

54. Stanley Fish, *Is There a Text in This Class* (Harvard University Press: Cambridge, 1980), p 23.
  55. E. Said, op.cit., p.26.
  56. *Ibid.*, p.36.
  57. The Zāhirī school derives its name from the Arabic word for clear, conspicuous, apparent. This group maintained that the literal meaning of the text is what should be followed. Any meaning that is not derived from the literal meaning is considered invalid.
  58. *Ibid.*, p.36.
  59. *Ibid.*, p.36.
  60. This is the basis of his thesis in *al-Rad ʿala al-Nuḥāt*, ed. Shawqī Dayf, (Cairo, 1947)
  61. E. Said, op.cit. p.38.
  62. *Ibid.*, p.38.
  63. *Ibid.*, p.38.
  64. *Ibid.*, p.38.
  65. Julius Stone, *Law and Social Science* (University of Minnesota Press: Minneapolis), 1966, p.61.
- An airplane was held in 1931 not to be a "motor vehicle" within the Motor Vehicle Theft Act, not because the legislature did not have airplanes in mind, but because the community in 1931 did not use and understand "motor vehicle" in that way. *Ibid.*, p.107
66. *Ibid.*, p.63.
  67. *Ibid.*, p.64.
  68. *Ibid.*, p.64.
  69. Ibn ʿAbidīn, *Nashr al-ʿurf fī Binā Ba ʿd al-Aḥkām ʿala al-ʿurf*, p.125.
  70. Stone, *Law and the Social Science* (Minneapolis, 1966), p.65.

71. W. Hallaq, "Considerations on the Function and Character of Sunnī Legal Theory" in *Journal of the American Oriental Society*. 104.4, (1984), p.682
72. My use of the word "assumed" is not used in the pejorative sense. In other words, whether the reasons were in fact those which led to the ultimate ruling, does not alter the fact that they were assumed simply because there is no recorded textual evidence to support these assumed reasons. Although there may be a few isolated cases of rulings accompanied by their *rationes*, this is not the general trend as we can see from the many classical legal works.
73. For an elaborate and comprehensive discussion on this topic see, W.Zuhaylī *Uṣūl al-Fiqh al-Islāmī*, pp.612-652.
74. Ibn ʿAbidīn, op.cit., p.21.
75. *Ibid.*, pp.17-28.
76. *Ibid.*, p.22.
77. *Ibid.*, p.23.
78. The Azharīs saw the facts differently to the Deobandīs.

## Conclusion.

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In my thesis I have attempted to highlight the leeways inherent in the concept of *stare decisis* and I have contrasted them with the traditional orthodox pattern of judgment which invariably elects to ignore or neglect them. The traditional pattern proceeds as if the outcome is decided wholly by the available precedents. My thesis recognizes leeways of choice when the authoritative materials offer such leeways, and the responsibility of the instant jurist within those leeways for choosing the rule most appropriate for the instant case.

The jurist must also, however, take into account the disturbance to certainty and stability of community expectations which would arise from departing from an assumedly binding precedent. It is obvious that mere marginal superiority of a new ruling would not suffice to sanction departure from the old rule. To warrant displacement by a new ruling, the shortfall of the old ruling must be gross enough to outweigh the negative effects of disturbing any settled expectations surrounding it. It would seem that certain value-preferences based upon community expectations, while these do not in themselves constitute legal precepts, tend to guide and even control the extent to which the ruling jurists are prepared to depart from precedent. The problem is that in most modern religious societies there tend to be two sets of "received ideals" operative. The "received ideals" of the orthodox vs the "received ideals" of the modernists. This clash directly influences the judicial process. On the one hand, the modernists charge that the "received ideals" of orthodoxy are persisting despite changes of circumstances which may have

rendered them dysfunctional. On the other hand, orthodoxy charges that the "received ideals" of the modernists are an empty assimilation of western ideals. This tension constitutes a major problem for the jurists, who are themselves split on the issue. Since any ruling is bound to incorporate "received ideals" regardless of whether one group approves of the tendencies of the others', the ruling should attempt to lay to rest received ideals which have become dysfunctional, or which have been appropriated to the benefit of sectional interests.

This study does not advocate in any way the undermining of precedent, but merely insists that its perspective ambit be adjusted. It recognizes the importance of precedent, since, to reduce the complicated exercise of judicial decisionmaking to terms of simple contrast between the application of existing legal principles and decision by reference not to principles at all, but only to extra-legal propositions, is a gross traversery of the dictates of established Islamic legal theory.

This study should therefore be viewed as an attempt to phase in the movement from precepts to other precepts, or from traditionally accepted precepts to neglected precepts, or from precepts that are too narrow to wider precepts, or from single precepts to clusters of precepts. Moreover, this study has shown that leeways may arise from the nature of the contents of legal precepts, or from competition between them, and also from certain features of precedent and *ratio* notions themselves, from the existence of vital extra-legal propositions, and finally from the fertile nature in which law and all discourse about law is packaged.

The major emphasis of this study has been to show why rigid adherence to the doctrine of precedent does not necessarily dictate the particular verdict reached by the jurist. There could be, and indeed, there must be



a clear introduction into the decisional process of extra-legal premises, drawn from the jurist's experience of his contemporary situation. At least, if an extra-legal premise is not expressly introduced into the legal arguments, it should operate as a reason for the jurist making one choice rather than another within available leeways.

Jurists cannot afford to ignore the impact of current values on their choices within the leeways which the law presents; though how far a particular jurist will consciously venture onto this ambitious ground will depend largely on personal philosophy and education. Therefore, the jurist's experience, his education, technical legal competence, boldness, timidity, ethical standards, must invariably influence his exercise of a choice within the leeways. Hence, the present study is, emphatically, not to advocate judicial choicemaking, but only to note the situations in which such choicemaking is unavoidable. We are therefore compelled to recognize how often the precedents ostensibly invoked as binding do not compel the decision reached on their basis.

Citing inadequately reasoned, tenuous dicta, remote or even merely verbal analogies and abstract syllogistic deduction, without seriously considering the leeways that tend to favour the current social facts, has become the hallmark of certain orthodox jurists. What is more, is that such a judicial process is not only devoid of any serious consideration of such vital leeways in legal choicemaking, but is utterly hostile to such considerations.

On the one hand, language is the "ubiquitous clothing" of legal phenomena; and on the other hand, logic and other forms of reasoning directly affect the way language is worked with and worked on in order to keep a legal system viable in the face of constant change on its application to the social phenomena it seeks to regulate.\*

One message of the present work arises from the rapidity of change in contemporary societies. It is that jurists and the community must learn to acknowledge those inherent features of legal theory which can assist in the application of the law in an environment which has undergone and is still undergoing a radical technological, economical and psychological change.

\* J.Stone, *Law and the Social Sciences*, p.57

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**GLOSSARY OF ARABIC TERMS.**

- ʿādah*: Habit, practice of the people, prevailing custom.  
*amānah*: Trust, guardianship.  
*ʿaql*: Human reason, intellectual faculty.  
*asbād al-nuzūl*: The occasions of revelation.  
*ʿaṣl*: Primary sources.  
*bāṭin*: Internal, esoteric.  
*ḍarūrah*: Necessity.  
*ḍarūri*: Necessary, *a priori*, a grade of *maṣlaḥah*: Indispensable in sustaining the good (*maṣālih*).  
*dīn*: Religion.  
*fatwah*: Legal decree.  
*fiqh*: The body of Islamic law.  
*garīb*: Unusual.  
*hājah*: General need.  
*ḥarām*: Forbidden.  
*ḥikmah*: Wisdom, reason.  
*ḥīlah*: Legal evasion.  
*ḥudūd Allāh*: Limits of God, penal laws.  
*ḥukm*: Value, practice, law, order.  
*ʿibādāt*: (Pl. of *ʿibādah*) obligations, rituals, worship. That which aims at the protection of religion (*dīn*). (Shātibī).
- idtirār*: Compulsion.  
*ijmāʿ*: Consensus.  
*ijtihād*: Independent legal reasoning.  
*ikhtiyārī*: By man's own choice.  
*ʿillah*: Motive, reason, cause, *ratio legis*  
*irādah*: Intention, will.  
*istidlāl*: Reasoning.  
*istiḥsān*: To decide in favour of something which is considered good by the jurist, over against the conclusion that may have been reached by analogy.  
*istinbāt*: Inference.  
*istisḥāḥ*: To decide in favour of something because it is considered good (*maṣlaḥah*), and more beneficial than any thing decided otherwise. A method of interpreting already existing rules, by disengaging the spirit of these rules from the letter: exceptions and extensions are reached which command practical Utility and correspond to the fundamental goals of the law.  
*kasb*: Acquisition.  
*kayl*: measurement.  
*khāṣṣ*: Particular.  
*khitāb*: Promulgation, proclamation.  
*khutbah*: Friday sermon delivered in the mosque.  
*kullī*: Universal.

- kulliyah*: Totality, whole.
- madhhab*: School of law.
- mafāsīd*: (Pl. of *mafsadah*).
- mafsadah*: Opposite of *maṣlaḥah*.
- makrūh*: Disliked.
- ma<sup>ʿ</sup>nā*: Meaning, reason.
- manāt*: Anchor, basis of a rule.
- manfa<sup>ʿ</sup>*: Benefit, utility.
- manṣūṣ ʿalayhī*: Laws that are directly based upon the revealed texts.
- maqāṣīd*: (Pl. of *maqṣīd*).
- maqṣīd*: Intention, goal, end, objective.
- maṣāliḥ*: (Pl. of *maṣlaḥah*).
- masālik al-ʿillah*: Methods of recognizing the ratio.
- maṣlaḥah*: Human good, human interest, human welfare, public interest, utility, welfare.
- maṣlaḥah mursalah*: A *maṣlaḥah* not explicitly supported by the text.
- mithāq*: An allegorical covenant.
- muftī*: Jurisconsult.
- mujtahid*: One who is qualified to extrapolate laws from the primary sources.
- mu<sup>ʿ</sup>amalāt*: Non devotional matters.
- mujtahid fihī*: Laws based upon individual interpretation.
- munāsabah*: Suitability.
- mutakallimūn*: Scholastic theologians.
- najis*: Impure, dirty.
- naql*: Transmission, tradition.
- naskh*: Abrogation.
- naṣṣ*: Text of the Quran and the Sunnah.
- qāḍī*: Judge.
- qaṣd*: Intention.
- qat<sup>ʿ</sup>i*: Definite.
- qawl*: View, statement.
- qiyās*: Analogy.
- quwwah*: Strong and effective.
- ra'y*: Personal discretion.
- sabab*: Reason, cause.
- shar<sup>ʿ</sup>ah*: Islamic Law.
- shart*: Condition, qualification.
- ṭāhir*: Clean, ritually pure.
- taḥṣīnī*: "To adopt that which conforms to the best of practice, and to avoid such manners that are disliked by men of wisdom." (Shātibī).
- takhṣīṣ*: Particularization.
- takrīm*: Honour and respect.
- tanqīḥ al-manāt*: Refinement of the basis of the ruling.
- taqlīd*: Adherence to a school of law.
- tarjīḥ*: Judicial preference.

*tashrīʿ*: Legislating.

*tawqīf*: Restraint,abstinence.

*ʿummah*: Islamic community

*ʿurf*: Prevailing norms, mores.

*uṣūl*: Legal principle.

*uṣūl al-fiqh*: Islamic legal theory.

*waḥī*: Divine revelation.

*wājib*: Compulsory, obligatory.

*wilāyah*: Trusteeship.

*wilāyah al-ijbārī*: Mandatory trusteeship.

*ẓāhir*: Apparent, literal.

*ẓannī*: Probable.